DOCKET

SUPREME COURT
OF THE UNITED STATES

No: 10-329
Vide 10-313
Title: Onjako Isogu, et al., Petitioners
v.
Michigan Bell Telephone Company, dba AT&T Michigan

Docketed: September 8, 2010
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos: (07-2469, 07-2473)
Decision Date: February 23, 2010
Rehearing Denied: June 2, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Aug 31 2010	Petition for a writ of certiorari filed. (Response due October 8, 2010)
Sep 30 2010	Order extending time to file response to petition to and including November 1, 2010
Nov 1 2010	Brief of respondent Michigan Bell Telephone Company, dba AT&T Michigan in opposition filed. VIDED
Nov 15 2010	DISTRIBUTED for Conference of December 3, 2010
Nov 15 2010	Reply of petitioners Onjako Isogu, et al. filed. (Distributed)
Dec 6 2010	DISTRIBUTED for Conference of December 10, 2010
Dec 10 2010	Petition GRANTED. The petition for a writ of certiorari in No. 10-313 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. Justice Kagan took no part in the consideration or decision of this petition.
Dec 20 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for petitioners Isogu, et al. VIDED
Dec 23 2010	SET FOR ARGUMENT ON Wednesday, March 30, 2011
Jan 4 2011	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for petitioner Talk America, Inc. VIDED
Jan 14 2011	Motion to dispense with printing the joint appendix filed by petitioners. VIDED
Jan 18 2011	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including January 27, 2011. VIDED
Jan 18 2011	The time to file respondents' brief on the merits is extended to and including March 1, 2011. VIDED
Jan 24 2011	Motion to dispense with printing the joint appendix filed by petitioners GRANTED. Justice Kagan took no part in the consideration or decision of this

motion

Jan 27 2011 Brief of petitioners Onjako Isogu, et al. filed

Jan 31 2011 Record received from U.S.C.A. for 6th Circuit (1 box)

Feb 3 2011 Brief amicus curiae of COMPTEL filed. VIDEO

Feb 3 2011 Brief amicus curiae of the United States filed. VIDEO

Feb 3 2011 Brief amicus curiae of California Public Utilities Commission filed. VIDEO (Distributed)

Feb 3 2011 Brief amicus curiae of Sprint Nextel Corporation filed. VIDEO (Distributed)

Feb 4 2011 CIRCULATED

Feb 4 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDEO

Mar 1 2011 Brief of respondent Michigan Bell Telephone Company, dba AT&T Michigan filed. VIDEO (Distributed)

Mar 1 2011 Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents. VIDEO

Mar 8 2011 Brief amici curiae of CenturyLink, et al. filed. VIDEO (Distributed)

Mar 8 2011 Brief amicus curiae of Verizon filed. VIDEO (Distributed)

Mar 8 2011 Brief amici curiae of United States Telecom Association and Network Engineers filed. VIDEO (Distributed)

Mar 8 2011 Brief amici curiae of Administrative Law Professors filed. VIDEO (Distributed)

Mar 18 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.

Mar 23 2011 Reply of petitioners Onjako Isogu, et al. filed. (Distributed)

Mar 30 2011 Argued. For petitioner: John J. Bursch, Solicitor General, Lansing, Mich., and Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
10-329 AUG 31 2010
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Orjiakor N. Isiogu, Monica Martinez, and Greg R. White, Commissioners of the Michigan Public Service Commission,

Petitioners,

v.

Michigan Bell Telephone Company, d/b/a AT&T Michigan,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To promote competition for local telephone service, the Telecommunications Act of 1996 (Act) requires incumbent telephone companies to make entrance facilities available to competitors (1) for network interconnection at cost-based rates, and (2) as unbundled network elements. In the *Triennial Review Remand Order (TRRO)*, the Federal Communications Commission (FCC) maintained the incumbent local telephone company's obligation to provide entrance facilities, which allow for interconnection, at cost-based rates, but found that competitors could effectively compete without access to entrance facilities as unbundled network elements. The questions presented are:

I. Whether the Sixth Circuit erred by determining that the Act and *TRRO* permit incumbent local telephone companies to charge competing telephone companies competitive rates which is more than cost-based rates for entrance facilities used for interconnection, thereby creating a conflict with the Seventh, Eighth, and Ninth Circuits.

II. Whether the Sixth Circuit erred by disregarding the FCC's interpretation of its regulations, contrary to the deference standard established by this Court in *Auer v. Robbins*, thereby creating a conflict with the Ninth Circuit.

PARTIES TO THE PROCEEDING

Petitioners are Orjiakor N. Isiogu, Monica Martinez, and Greg R. White, in their official capacity as Commissioners of the Michigan Public Service Commission and not as individuals.[1] Respondent is Michigan Bell Telephone Company, d/b/a AT&T Michigan.

Intervenors in the lower courts have included American Farm Bureau, Inc., Covad Communications Company, CMC Telecom, Inc., Climax Telephone Company, GRID 4 Communications, Inc., Easton Telecom Services, L.L.C., LDMI Telecommunications, Inc., MCImetro Access Transmission Services L.L.C., McLeodUSA Telecommunications Services, Inc., Neutral Tandem – Michigan, L.L.C., NOW Communications, Inc., PNG Telecommunications Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Talk America Inc., TCG Detroit, TelNet Worldwide, Inc., Trinsic Communications, Inc., XO Communications Services, Inc., and Zenk Group, Ltd., d/b/a Planet Access.

Amicus curiae before the Court of Appeals for the Sixth Circuit were Verizon, the Federal Communications Commission, and the Michigan Internet and Telecommunications Alliance.

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[1] Pursuant to Sup. Ct. R. 35.3, Orjiakor N. Isiogu, and Greg R. White have been automatically substituted as parties. Their predecessors, J. Peter Lark and Laura Chappelle, who were the named parties before the Court of Appeals, cease to hold public office.

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JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 [codified in numerous sections of Title 47 of the United States Code]. Section 251(c)(2)-(3) of the Act, 47 U.S.C. §§ 251(c)(2)-(3), is reproduced in the Appendix. Pet. App. 158a – 159a.

In the *Triennial Review Remand Order (TRRO)*, the Federal Communications Commission interprets the Act. The applicable paragraphs of the *TRRO*, 20

FCC Rcd. 2609-12, ¶¶ 136-141, are reproduced in the Appendix. Pet. App. 160a – 168a.

INTRODUCTION

The Sixth Circuit's decision should be reviewed because it involves important federal questions and directly conflicts with decisions of the Seventh, Eighth, and Ninth Circuits. Moreover, the Sixth Circuit failed to follow this Court's decision in *Auer v. Robbins*,[2] failed to defer to the Federal Communications Commission's (FCC) interpretation, and created another conflict with the Ninth Circuit.

Under the Telecommunications Act of 1996 (the Act), Congress sought to open up the local telephone markets to competition. Recognizing that incumbent monopolist providers of local telephone service have strong economic incentives to delay and impede competition, Congress required incumbent local exchange carriers (ILECs) to share their equipment and services with competitive local exchange carriers (CLECs). One of the specific obligations imposed was to make entrance facilities available to CLECs either as a means of interconnection with the ILEC's network or as unbundled network elements. 47 U.S.C. §§ 251(c)(2)-(3). Pet. App. 158a – 159a.

In the *Triennial Review Remand Order* (*TRRO*), the FCC addressed whether entrance facilities should be offered on an unbundled basis under Section

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[2] *Auer v. Robbins*, 519 U.S. 452 (1997).

251(c)(3) of the Act.[3] An entrance facility is a type of dedicated transport that provides a transmission path between ILEC and CLEC networks.[4] Pet. App. 160a – 161a. These facilities have two purposes. First, for interconnection, as a method to exchange traffic between the ILEC and CLEC networks. Second, as a network element, which allows the CLEC to carry traffic to and from its own customers.

The FCC found that CLECs could effectively compete without access to entrance facilities, and therefore are not entitled to use entrance facilities as part of the unbundling obligations imposed on ILECs under Section 251(c)(3) of the Act.[5] Pet. App. 167a. This finding, however, did not relieve ILECs of their separate duty to provide CLECs with access to entrance facilities under Section 251(c)(2) for the purpose of interconnection.[6] Pet. App. 167a. By maintaining an ILEC's obligation to offer entrance facilities to CLECs for interconnection, the FCC adhered to the Act's purpose of fostering competition in local telephone networks.

The Sixth Circuit, in a 2 – to – 1 decision, determined that the plain meaning of the Act and the *TRRO* permit ILECs to charge CLECs competitive rates – which are more than cost-based rates – for the use of the ILECs' entrance facilities, so long as the ILEC offers other interconnection facilities at cost-

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[3] *Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2005) (*TRRO*).

[4] *TRRO*, 20 FCC Rcd. at 2609 (¶ 136).

[5] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

[6] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

based rates. But, that decision conflicts with decisions of the Seventh, Eighth, and Ninth Circuits. Each of those three Circuits held that the Act imposes separate obligations on ILECs to allow the use of entrance facilities under Sections 251(c)(2) and 251(c)(3) of the Act and that the FCC expressly recognized the Act's separate obligation for entrance facilities used for interconnection in the *TRRO*.

This split of authority is of considerable importance, not only because it creates uncertainty on a previously settled legal issue, but also because the Sixth Circuit's decision threatens to thwart competition, by increasing a CLEC's cost of market entry. Thus, the lower court's decision creates an advantage for incumbent carriers at the expense of consumers.

Lastly, the Sixth Circuit erred when it determined that it was not required to afford deference to the FCC's interpretation under this Court's decision in *Auer v. Robbins*.[1] In *Auer*, this Court held that a reviewing court should defer to an administrative agency's construction and interpretation of its own regulations. The Sixth Circuit's decision here to deny *Auer* deference to the FCC's interpretation also presents a second conflict because the Ninth Circuit afforded such deference to the FCC's interpretation when examining the identical issue.

STATEMENT OF THE CASE

The Michigan Public Service Commission (MPSC) has regulatory authority under the laws of the

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[1] *Auer*, 519 U.S. at 452.

State of Michigan over the intrastate operations of telecommunications carriers.

Michigan Bell Telephone Company, d/b/a AT&T Michigan (AT&T) is an ILEC that provides intrastate telecommunications service in Michigan.

On May 17, 2005, the Michigan Public Service Commission issued an order modifying the process used to bring current interconnection agreements into compliance with the FCC's *Triennial Review Order (TRO)*[8] and *TRRO*. Pet. App. 86a. One of the 29 disputed issues resolved by the MPSC was the treatment of entrance facilities. Pet. App. 86a – 91a.

After reviewing the evidence, the MPSC issued its decision on September 20, 2005. Consistent with the FCC's interpretation, the MPSC found that when used for interconnection purposes, ILECs must provide entrance facilities to CLECs at Total Element Long Run Incremental (TELRIC), or cost-based rates. Pet. App. 102a – 103a.

AT&T appealed the MPSC's Order to the U.S. District Court of the Eastern District of Michigan seeking declaratory and injunctive relief. Pet. App. 56a – 58a. Motions for summary disposition were filed by AT&T and participating CLECs. Following briefing and oral argument on the motions, the District Court issued a September 26, 2007, Order granting, in part,

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[8] *Review the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984 (2003), vacated in part, *United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*TRO*).

AT&T's motion, and granting, in part, the CLEC's motion. Pet. App. 56a – 58a. On October 27, 2007, the District Court entered a judgment reversing in part, the MPSC's September 20, 2005, Order. Pet. App. 70a – 73a. The District Court determined that the MPSC's decision undermined the basic finding of the *TRRO* that entrance facilities were no longer required to be provided as an unbundled network element and should be offered at competitive pricing. Pet. App. 72a- 73a.

The MPSC Commissioners appealed the District Court's decision to the U.S. Court of Appeals for the Sixth Circuit. On February 23, 2010, the Sixth Circuit affirmed the District Court's Order finding that the "plain meaning" of the Act, its regulations, and the *TRRO* permits ILECs to charge CLECs competitive rates for the use of the ILECs' entrance facilities so long as the ILEC offers other interconnection facilities at cost-based rates.[8] Pet. App. 1a – 53a.

[8] *Michigan Bell Tel. Co. v. Coxad Communications Co.*, 597 F.3d 370 (6th Cir. 2010).

REASONS FOR GRANTING THE PETITION

1. The Sixth Circuit's decision – which creates a conflict among the Circuits – is contrary to the Act's purpose of promoting competition in the provision of local telephone service.

When opening up local telephone markets to competition, Congress recognized the obstacles prospective competitors faced when attempting to compete with ILECs in providing consumers with telephone service. Instead of requiring CLECs to duplicate an ILECs existing infrastructure, the Act imposed certain duties on ILECs that would foster and promote competition. Each of these duties is separate and distinct from one another.[10] Two such duties are relevant to this case.

Under Section 251(c)(2) of the Act, an ILEC is required to provide interconnection between its network and CLEC networks. Under its statutory duty to interconnect, an ILEC must charge a CLEC rates that are cost based.[11] Pet. App. 158a. In a separate requirement, under Section 251(c)(3) of the Act, ILECs must provide CLECs with unbundled access to elements of its network when a CLEC would be unable to effectively compete without such access, i.e., the CLEC would be impaired.[12] Pet. App. 158a – 159a. If the FCC makes a finding of impairment, the ILEC must charge the CLEC cost-based rates for that element.[13] Pet. App. 158a – 159a.

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[10] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 370 (1999).

[11] 47 U.S.C. § 251(c)(2).

[12] 47 U.S.C. § 251(c)(3).

[13] 47 U.S.C. § 251(c)(3).

An entrance facility is a type of dedicated transport that provides a transmission path between ILEC and CLEC networks.[4] Pet. App. 160a – 162a. As this facility is a connection between one telecommunication carrier's switch and another carrier's switch, an entrance facility can have two uses. The Ninth Circuit succinctly described entrance facilities saying:

> An entrance facility is a "dedicated transport" (a wire) that connects one LEC's "switch" (a computer that routes calls) to another LEC's switch. In other words, an entrance facility is the high capacity wire that links telephone networks. Entrance facilities may be used for two distinct purposes. First, a competitive LEC can use an entrance facility for interconnection – that is, to link the competitive LEC's network with that of the incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. *See* TRRO P 138-40, TRO P 366-67. Second, a competitive LEC can use an entrance facility for what the industry calls "backhauling." In the case of backhauling, the competitive LEC uses the entrance facility to permit its *own* customers to

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[4] *TRRO*, 20 FCC Rcd. at 2609 (¶ 136).

> reach *one another* over the incumbent LECs network.[15]

In the *TRRO*, the FCC determined that CLECs are not impaired without access to entrance facilities, and therefore are not entitled to such facilities as an unbundled network element.[16] Pet. App. 160a – 168a. An impairment finding is made when a CLEC's ability to competitively offer telecommunications service is materially diminished without access to an ILEC's network element.[17]

Pursuant to its finding, the FCC adopted a regulation stating that ILECs are not required to provide CLECs with access to entrance facilities on an unbundled basis.[18] Specifically, the FCC stated:

> (i) Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers.[19]

In addition to its determination regarding the unbundling of entrance facilities as network elements, the FCC explicitly recognized the ILECs' obligation,

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[15] *Pacific Bell Tel. Co. v. California Public Utilities Comm'n*, 597 F.3d 958, 963 (9th Cir. 2010) (emphasis added).

[16] *TRRO*, 20 FCC Rcd. at 2609-2612 (¶¶ 136-141).

[17] 47 U.S.C. § 251(d)(2)(B). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3725 (¶ 51) (1999).

[18] 47 C.F.R. § 51.319(e)(2)(i).

[19] 47 C.F.R. § 51.319(e)(2)(i).

under Section 251(c)(2) of the Act, to make entrance facilities available to CLECs at cost-based rates when the CLEC requires them to interconnect with the ILEC's network:

> [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[20] [Pet. App. 167a.]

Consistent with the requirements of the Act, the FCC – in Paragraph 140 of the *TRRO* – recognized that CLECs use entrance facilities for more than one purpose and was careful to explain that only when an entrance facility was used as an unbundled network element was it affected by the *TRRO*'s unbundling determinations. As a result, the *TRRO* did not alter the Act's separate duty imposed on ILECs to provide access to entrance facilities when being used for interconnection purposes.

The FCC has consistently acknowledged that CLECs use entrance facilities in two distinct ways. In the *Triennial Review Order* (*TRO*), the FCC stated that CLECs use entrance facilities:

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[20] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

- To provide a final link in the dedicated transmission path between a CLEC's customer and the CLEC's switch, and

- As interconnection facilities to exchange traffic between the CLEC's switch and the ILEC's switch.[21]

In the first use, CLECs are not employing entrance facilities for interconnection. Instead, the CLECs are using entrance facilities for "backhauling" or carrying traffic to and from its own customers. ILECs are permitted to charge competitive rates for "backhauling." In the second use, CLECs are using entrance facilities to interconnect with ILECs' networks. This provides a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks.[22]

In the *TRRO*, the FCC determined that when a CLEC uses entrance facilities for backhauling, the method outlined in the first bullet, the CLEC is not impaired without access to the entrance facility from the ILEC as an unbundled network element (i.e., at cost-based rates). But the FCC's *TRRO* also reaffirmed the ILEC's obligation under Section 251(c)(2) of the Act to provide entrance facilities to CLEC's at cost-based rates when the CLEC uses the facility to interconnect with the ILEC's network.[23] Pet. App. 167a. Moreover, the FCC's *TRRO* reiterated that the Act mandates

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[21] *TRO*, 18 FCC Rcd. at 17202-17203 (¶¶ 365-366).

[22] *TRO*, 18 FCC Rcd. at 17202-17203 (¶¶ 365-366).

[23] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

cost-based rates for network interconnection.[24] Pet. App. 167a.

In implementing the Act's mandate for cost-based rates and consistent with the plain language of 47 U.S.C. § 251(c)(2) (3) and 47 U.S.C. § 252(d)(1), the FCC concluded that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The FCC stated:

> Sections 251(c)(2) and (c)(3) impose an identical duty on incumbent LECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in section 252(d)(1). Based on the plain language of sections 251(c)(2), (c)(3), and section 252(c)(1), *we conclude that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The pricing rules we adopt [i.e., TELRIC] shall, therefore apply to both.*[25]

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[24] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140). See also 47 U.S.C. § 251(c)(2)(D) and 47 U.S.C. § 252(d)(1).

[25] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15816 (¶ 628) (1996), (emphasis added) (*Local Competition Order*) aff'd by *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 497 (2002). *See also* 47 C.F.R. 51.501(a) – 51.505 (2005).

The Sixth Circuit's Opinion contradicts established legal standards and challenges the Act's mandate that local telecommunication markets be opened to competition. The Sixth Circuit's attempt to clarify and simplify a highly technical and complex body of law has had precisely the opposite effect. That is, by substituting its judgment for the expertise of the agency that administers and enforces the Act, the Sixth Circuit has created ambiguity in a previously settled area of law and has invited anti-competitive behavior when Congress has plainly sought to open up the local telephone markets to competition.

The Sixth Circuit then compounds its error when it quotes portions of the Act, the FCC's implementing regulations, and the *TRRO* when purporting to engage in a "plain meaning" analysis, which concludes by finding that "an ILEC can charge competitive rates for the use of its entrance facilities."[26] Pet. App. 30a – 35a. But the Sixth Circuit's reasoning is based on a fundamentally flawed premise, i.e., that "interconnection facilities and entrance facilities are different things."[27] This finding disregards the fact that one of the functions that can be performed by an entrance facility is interconnection.

Given this fundamental error, it should come as no surprise that the Sixth Circuit's analysis and conclusion not only conflicts with the FCC's past and present interpretation of its statutes and regulations,[28] Pet. App. 30a – 40a, but that it is also contrary to the

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[26] *Michigan Bell Tel.*, 597 F.3d at 382.

[27] *Michigan Bell Tel.*, 597 F.3d at 384.

[28] *Michigan Bell Tel.*, 597 F.3d at 383.

decisions of other federal circuits, which have been presented with the same or similar issue.

No fewer than three Circuits – the Seventh, Eighth, and Ninth – have addressed this question, and each of their rulings is consistent with the FCC's interpretation. In *Southwestern Bell Telephone Co. v. Missouri Public Service Comm'n*, the Eighth Circuit acknowledged the separate obligation that the Act imposed on ILECs, in Section 251(c)(2) of the Act, to provide CLECs with entrance facilities needed for interconnection at TELRIC cost-based rates.[29] Specifically, the Eighth Circuit stated:

> The FCC has held CLECs are not impaired without access to entrance facilities and are not entitled to entrance facilities as UNEs under § 251(c)(3). The FCC's finding of non-impairment does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic. The FCC determined when a CLEC uses entrance facilities to carry traffic to and from its own end users, i.e., backhauling or CLEC to CLEC, the CLEC is not entitled to obtain entrance facilities as UNEs at TELRIC rates. If a CLEC needs entrance facilities to interconnect with an ILEC's

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[29] *Southwestern Bell Tel., L.P. v. Missouri Public Service Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008) *cert. denied*, 129 S. Ct. 971 (2009).

> network, it has the right to obtain such facilities from the ILEC. Thus, CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network.
>
> Additionally, "interconnection" means the physical linking of two networks for the mutual exchange of traffic. The term "interconnect" refers to "'facilities and equipment," not to the provision of any service."[30]

Likewise, the Seventh Circuit, in *Illinois Bell Telephone Co. v. Box*, performed a similar analysis and reached the same conclusion as the Eight Circuit.[31]

More recently, the Ninth Circuit, in *Pacific Bell Tel. Co. v. California Public Utilities Comm'n*, issued an opinion consistent with the decisions of the Seventh and Eighth Circuits, and which expressly applied *Auer* deference to the FCC's determination that the Act's separate statutory obligations requires ILECs to make entrance facilities available to CLECs at cost-based rates when those facilities are used for the purpose of interconnection.[32]

Finally, it should be noted that the Seventh, Eighth, and Ninth Circuits reached identical conclusions after reviewing the same statutes,

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[30] *Southwestern Bell Tel.*, 530 F.3d at 683-684.

[31] *Illinois Bell Tel. Co v. Box*, 526 F.3d 1069, 1072-1073 (7th Cir. 2008).

[32] *Pacific Bell Tel. Co.*, 597 F.3d at 967-969.

regulations, and FCC interpretations that are presented here. For that reason, the existence of a conflict cannot be denied. Moreover, the decision of the Sixth Circuit by itself warrants review. For, without review, a CLECs ability to compete, and more importantly a consumer's ability to choose from competitive rates, may now depend on what Circuit they reside in.

II. The decision below conflicts with this Court's precedent, creating an additional split of authority with the Ninth Circuit, by failing to afford deference to the FCC's interpretation of the statutes and regulations it administers.

The FCC's interpretation of the statutes and regulations it administers should be afforded deference. In *Auer v. Robbins*, this Court stated that an expert agency's construction of the regulation it administers must be given deference unless Congress has "directly spoken to the precise question at issue."[33] This Court has consistently endorsed the principle that courts should afford "substantial deference" to an agency's construction of its own rules and regulations.[34] An expert agency's interpretation of its own regulations is "controlling" so long as it represents a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation."[35]

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[33] *Auer v. Robbins*, 519 U.S. at 457 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-843 (1984)).

[34] *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008); *Auer*, 519 U.S. at 461.

[35] *Coeur Alaska, Inc. v. Se. Alaska Cons. Council*, 557 U.S. __, 129 S. Ct. 2458, 2470 (2009); *Auer*, 519 U.S. at 461-462.

Here, the Sixth Circuit erred when it dismissed the opinion of the federal agency responsible for administering and interpreting the Act and its regulations. By failing to defer to the FCC's fair and considered interpretation, the lower court not only disregarded the persuasive opinions of the Seventh, Eighth, and Ninth Circuits to create its own "plain meaning" interpretation, but also failed to follow this Court's precedent by ignoring the standard of deference this Court has determined should be afforded to an expert agency's interpretation of its regulations.

A. The FCC's interpretation of the *TRRO* should be afforded *Auer* deference.

Absent Congress's express intent to address an issue, deference should be given by a court to an expert agency's construction of the statute it administers.[36] Review of the Act demonstrates that Congress did not directly speak to whether ILECs have a duty to provide entrance facilities to CLECs to interconnect their networks under Section 251(c)(2). In the absence of congressional direction, the FCC is authorized to interpret any statutory ambiguities.[37] Moreover, the federal appellate courts are required to follow the Court's directly controlling precedent.[38]

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[36] *Chevron*, 467 U.S. at 842-843.

[37] *Nat'l Cable Telecommuns. Ass'n v. Brand X Internet*, 545 U.S. 967, 280 (2005); *Chevron*, 467 U.S. at 843.

[38] *Nat'l Cable Telecommuns.*, 545 U.S at 986, citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (requiring the Courts of Appeals to adhere to our directly controlling precedents, even those that rest on reasons rejected in other decisions).

Over a dissenting opinion, the Sixth Circuit, in a footnote, elected not to apply *Auer* deference.[39] In opposition to the Court's decision in *Auer*, the Sixth Circuit failed to afford any deference to the FCC's interpretation of the *TRRO* and its regulations. The Court of Appeals attempted to justify ignoring the FCC's interpretation by asserting the following:

> [T]he FCC's proffered interpretation is so plainly erroneous or inconsistent with the regulation, see *Auer*, 519 U.S. at 461, that we can only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting a regulation.[40] [Pet. App. 12a.]

The Sixth Circuit proceeded to restate the text of the *TRRO* based on its interpretation of the "plain meaning" of the language and then offered a new translation of the words in the FCC's order. It created what it described as a "simple" analogy, lasting two full pages of the opinion – involving a municipal ordinance, a park, a garage, and a big orange extension cord – that ostensibly supports the panel's "plain meaning" translation.[41] Pet. App. 23a – 27a. As Judge Sutton noted in his dissent, the majority made an admirable attempt to clarify complex, technical issues, but the attempt itself belies the claim that the FCC's interpretation is so plainly inconsistent with the language of the regulation that it is not entitled to be afforded deference. The Sixth Circuit also expressed

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[39] *Michigan Bell Tel.*, 597 F.3d at 375.

[40] *Michigan Bell Tel.*, 597 F.3d at 375.

[41] *Michigan Bell Tel.*, 597 F.3d at 379-381.

skepticism over deferring to the FCC's "interpretive rules" and expert agency opinions rendered in *amicus* briefs. Such concern is unwarranted.

An expert agency's interpretation should be afforded deference so long as it represents a fair and considered judgment. This Court has recognized expert agency interpretations in a variety of forms. In *Auer*, this Court requested the Secretary of Labor to file an *amicus* brief interpreting the salary-basis test set forth in the agency's regulations.[42] In reference to that agency's interpretation, this Court stated:

> Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)).[43]

The Court continued, saying:

> Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The

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[42] *Auer*, 519 U.S. at 461-463.

[43] *Auer*, 519 U.S. at 461.

> Secretary's position is in no sense a "*post hoc* rationalization" advanced by an agency seeking to defend past agency action against attack. *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.[44]

Furthermore, when reviewing an agency's "fair and considered judgment," the Court has extended deference beyond interpretations expressed in legal briefs. Deference has been afforded to expert agency opinion letters, which are issued on a more frequent basis.[45]

Recently, in *Coeur Alaska*, this Court applied *Auer* deference to an interagency memorandum.[46] In fact, in *Coeur Alaska*, Justice Scalia recognized in his concurring opinion that "[i]t is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions."[47]

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[44] *Auer*, 519 U.S. at 462.

[45] *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 563-564 (1980).

[46] *See Coeur Alaska*, 129 S.Ct. at 2473.

[47] *Coeur Alaska*, 129 S.Ct. at 2479.

In a further attempt to avoid the Court's deference standard, the Sixth Circuit suggests that the FCC's *TRRO* is no more than an "interpretive rule" and not a "regulation." As interpretive rules explain or clarify the expert agency's regulations and do not have to go through the same legislative notice and comment period, the lower court questioned the appropriateness of applying *Auer* deference to the FCC's Order.[48] Pet. App. 10a – 12a.

The FCC's Orders here are not loose assertions put forward by the agency. Indeed, they have undergone greater criticism than an interpretive rule. Through its *TRO* and *TRRO*, the FCC – as authorized by Congress – implemented the Act's provisions. Further, when the FCC adopted the *TRRO*, it simultaneously adopted its promulgated rules. A formal notice and comment period was held for both the *TRRO* and the regulations.[49]

Even if the FCC's Order was simply an interpretive rule, further consideration should be given to the FCC's opinion due to the nature of the regulations. The FCC is charged with administering the Telecommunications Act. A cursory review of the Act and its implementing regulations demonstrates that the relationship between ILECs and CLECs is a highly technical and complex subject matter. When examining areas of such a technical nature, this Court has recognized the importance of the administering agency's interpretation and at least a general level of

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[48] *Michigan Bell Tel.*, 597 F.3d at 375.

[49] *See TRRO*, ¶¶ 18–19, 239–251.

deference should be afforded.[50] Judicial deference to expert agency interpretations of rules and regulations is an essential element to providing regulatory certainty to market participants.[51] The FCC is the agency with the expertise required to clarify the interpretative and technical issues arising from the Act and its implementation, and consistent with *Auer*, the Sixth Circuit should have deferred to the FCC's regulatory expertise.

B. The Ninth Circuit properly applied *Auer* deference when analyzing the same issue.

As previously discussed, the Ninth Circuit held that the FCC's regulations authorize ILECs to provide entrance facilities to CLECs at cost-based rates for the purpose of interconnection.[52] This analysis was in part predicated on deference to the FCC's interpretation of the relevant provisions of the *TRRO*. This creates an additional conflict between the Circuits.

After reviewing the applicable statutory provisions and regulations, the Ninth Circuit examined the FCC's interpretive orders, applied *Auer* deference, and concluded the FCC's interpretation was a reasonable one, saying:

> The TRO thus expressly interpreted the LCO to allow competitive LECs to lease entrance facilities or "transmission links" at TELRIC rates for the purpose of

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[50] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[51] *Coeur Alaska*, 129 S.Ct. at 2479.

[52] *Pacific Bell*, 597 F. 3d at 965.

> achieving interconnection. This interpretation of the LCO is reasonable and entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation.").[53]

The dissenting judge in the Sixth Circuit likewise noted the reasonableness of the FCC's interpretation. Pet. App. 41a – 53a. In his dissent, Judge Sutton explains:

> In deciding what incumbents may charge for the use of their entrance facilities, the FCC interprets its regulations to draw a distinction. On one side of the line, incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection. On the other side, incumbents may charge market-based rates, or not lease the facilities at all, when competitors use the facilities for backhauling. *See* FCC Br. at 15-17, 20. Everyone (at least everyone involved in this case) agrees that the FCC correctly concluded that incumbents may charge market-based rates for backhauling. What divides the parties is whether the FCC correctly concluded that incumbents cannot do the same for interconnection.

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[53] *Pacific Bell*, 597 F. 3d at 968 (footnotes omitted).

> In answering this question, we must keep in mind that Congress charged the FCC with administering § 251, *see* 47 U.S.C. § 251(d)(1), and the FCC wrote the regulations at issue, all of which means that the FCC's interpretation binds us unless it flouts the regulations' text. *See Auer*, 519 U.S. at 461.
>
> The line drawn by the FCC permissibly interprets its own regulation. In elaborating on § 251(c)(2)'s duty to "provide . . . interconnection," the FCC's regulation says that incumbents must provide "any technically feasible method of obtaining interconnection" at cost-based rates. 47 C.F.R. § 51.321(a).[34] [Pet. App. 43a – 44a.]

The problem with the Sixth Circuit's decision is it displaces a reasonable interpretation of laws and regulations that the FCC administers and enforces, which is what this Court recognized in *Auer*. In short, when there is no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question, a Court's inquiry should end. Here, however, the Sixth Circuit has not only substituted its judgment for the expertise of the agency in a complex and technical area of the law, but has done so in a manner which is based on a fundamentally flawed analysis that is at odds with the intent of Congress in passing the Act.

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[34] *Michigan Bell Tel.*, 597 F.3d at 387-388.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Dated: August 2010

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 10a0052p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 07-2469
MICHIGAN BELL TELEPHONE COMPANY,
Plaintiff-Appellee,

v.

Nos. 07-2469/2473

COVAD COMMUNICATIONS COMPANY, et al.,
Intervenors Defendants-Appellants,

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., et al.,
Intervenors,

J. PETER LARK, Commissioner, et al.,
Defendants.

No. 07-2473
MICHIGAN BELL TELEPHONE COMPANY,
Plaintiff-Appellee,

v.

LAURA CHAPPELLE, et al.,
Defendants-Appellants,

COVAD COMMUNICATIONS COMPANY, et al.,
Intervenors.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-11982—Julian A. Cook, Jr., District Judge.

Argued: December 10, 2008

Decided and Filed: February 23, 2010

Before: BATCHELDER, Chief Judge; GILMAN and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Bill Magness, CASEY, GENTZ & MAGNESS, L.L.P., Austin, Texas, Michael A. Nickerson, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants. William Julius Champion III, DICKINSON WRIGHT PLLC, Ann Arbor, Michigan, for Appellee. Scott H. Angstreich, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC, Washington, D.C., for Amici Curiae. **ON BRIEF:** Bill Magness, CASEY, GENTZ & MAGNESS, L.L.P., Austin, Texas, Steven D. Hughey, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Michael S. Ashton, FRASER, TREBILCOCK, DAVIS & DUNLAP, P.C., Lansing, Michigan, Steven D. Hughey, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants. William Julius Champion III, Jeffery V. Stuckey, DICKINSON WRIGHT PLLC, Ann Arbor, Michigan, for Appellee. Scott H. Angstreich,

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BATCHELDER, C.J., delivered the opinion of the court, in which GILMAN, J.,joined. SUTTON, J. (pp. 23-31), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Chief Judge. A state telephone-utility commission and several competitive local exchange carriers appeal a judgment in which the district court vacated the commission's order requiring the incumbent local exchange carrier to provide certain "entrance facilities" at wholesale prices. Finding the appellants' arguments unpersuasive, we AFFIRM.

I.

Congress enacted the Telecommunications Act of 1996, 47 U.S.C. § 152 *et seq.*, to mandate "that local service, which was previously operated as a monopoly overseen by the several states, be opened to competition." *MCI Telecom. Corp. v. Bell Atl.*, 271 F.3d 491, 497 (3d Cir. 2001). Congress required the incumbent local exchange carriers (ILECs) to cooperate with competitive local exchange carriers (CLECs) to allow the CLECs to enter the market, either by connecting their equipment to the ILEC's existing network or by purchasing or leasing existing network

elements and services. *Id.* The ILECs and CLECs, through negotiation or arbitration, enter into "interconnection agreements," which set out the terms, rates, and conditions. *Id.* Congress directed the Federal Communications Commission (FCC) to promulgate implementing regulations, but gave oversight of the interconnection agreements to the state public-utility commissions. *Id.*

In the present case, the ILEC is Michigan Bell; the CLECs are Covad Communications, Talk America, Inc., XO Communications, McLeod USA Telecommunications, and TDS Metrocom; and the state utility commission is the Michigan Public Service Commission (MPSC), for which the individual commissioners were J. Peter Lark, Laura Chappelle, and Monica Martinez. This case concerns the regulation of "entrance facilities," a type of transmission facility that connects a CLEC network with an ILEC network. But, just to be clear, an "entrance facility" is really just a fancy name for a cable or wire used to transport calls from a CLEC switch to an ILEC switch, and this wire can be very short (if the two switches are close together), or it can be very long, stretching for blocks or even miles (if the switches are far apart), depending on the relative locations of the two switches.

As Congress directed, the FCC promulgated regulations regarding interconnection, *see* 47 C.F.R. § 51.1 *et seq.*, and then set about deciding which of the ILEC's network elements must be "unbundled"; that is, which of the ILEC's network elements must be offered for sale or lease to the CLECs at regulated prices or

rates.[1] In August 1996, the FCC issued its *Local Competition Order*, 11 FCC Rcd. 15499, 1996 WL 452885 (Aug. 8, 1996), in which it purported to apply the Act's "impairment test"[2] and — finding impairment everywhere — required the ILECs to unbundle *all* of their interoffice transmission facilities (which included entrance facilities). But the Supreme Court vacated that order, finding the FCC's analysis of impairment unjustifiably over-broad, and remanded the issue to the FCC to try again. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Meanwhile, Michigan Bell had begun to provide for the CLECs to connect to its network. In so doing, Michigan Bell added "entrance facilities" (i.e., cables or wires) with which the CLECs could connect, in order to access Michigan Bell's network. Acting pursuant to the

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[1] The FCC created a particular set of regulated rates called "Total Element Long Run Incremental Cost" (TELRIC) rates. Thus, "unbundled" means "regulated," which means "at TELRIC rates." *See Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 531 (2002) (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 394 (1999)) ("Bundling is about lease pricing. To provide a network element 'on an unbundled basis' is to lease the element, however described, to a requesting carrier at a stated price specific to that element."); *see also USTA v. FCC* (*USTA II*), 359 F.3d 554, 561-62 (D.C. Cir. 2004) (discussing "unbundling requirements").

[2] The "impairment test" states:

> In determining what network elements should be made available [on an unbundled basis, i.e., to the CLECs at TELRIC rates], the [FCC] shall consider, at a minimum, whether . . . the [ILEC's] failure to provide access to such network elements would impair the ability of the [CLEC] to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2)(B).

FCC's initial directives, Michigan Bell offered its "entrance facilities" to the CLECs at regulated rates.

The FCC, on remand from the *Iowa Utilities Board* decision, again required the ILECs to unbundle *all* of their interoffice transmission facilities (including entrance facilities), once again under an "impairment test" in which it found impairment everywhere. *See UNE Remand Order*, 15 FCC Rcd. 3696, 1999 WL 1008985 (Nov. 5, 1999). But the reviewing court vacated that order as well, finding the FCC's analysis of impairment unjustifiably over-broad, and remanded the issue to the FCC to try a third time. *See USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

In its third attempt, on remand from the D.C. Circuit, the FCC — among other things — removed "entrance facilities" from its description of the ILEC network and concluded that an impairment test was not even necessary to hold that entrance facilities need not be unbundled. *See Triennial Review Order* (*TRO*), 18 FCC Rcd. 16978, 2003 WL 22175730, ¶ 366 n.1116 (Sept. 17, 2003) ("Our determination here effectively eliminates 'entrance facilities' as UNEs [unbundled network elements] and, therefore, moots the [FCC's pending notice of proposed rule making] insofar as it proposes limitations on obtaining entrance facilities as UNEs."). But the reviewing court vacated the order yet again, finding that the FCC's exclusion of entrance facilities from the impairment analysis was improper and directing that the FCC must conduct an impairment analysis for entrance facilities. *See USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

Consequently, the FCC issued a fourth order, the *Triennial Review Remand Order* (*TRRO*), 20 FCC Rcd. 2533, 2005 WL 289015 (Feb. 4, 2005), in which it reestablished that entrance facilities are a part of the ILEC network, but found that unbundled access was not necessary because the CLECs were not impaired by paying competitive rates for the use of entrance facilities.[3] At the conclusion of this finding, however, the FCC included the following paragraph:

> **140.** We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these [interconnection] facilities[4] at cost-

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[3] "In fact, the *[USTA II]* court expressed skepticism that incumbent LECs should be required to build entrance facilities under any circumstances." *TRRO*, 20 FCC Rcd 2533, 2005 WL 289015, ¶ 137 n.383 (citing *USTA v. FCC*, 359 F.3d 554, 586 (D.C. Cir. 2004) ("If (as appears) [entrance facilities] exist exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them . . . .")).

[4] Although it may appear obvious, it bears express mention that, in writing this paragraph, the FCC did not use "interconnection" as a verb, describing the act of interconnecting with the ILEC network. As used in this paragraph, "interconnection" is an adjective, describing a noun (a certain type of facility) and thereby creating a new noun, an "interconnection facility," as something different and distinct from an "entrance facility." So, when the FCC says "access to these facilities" in the final sentence, we are confident that the FCC is referring to these "*interconnection*

> based rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO, 20 FCC Rcd. 2533, 2005 WL 289015, ¶ 140 (footnotes omitted).

As mentioned previously, Michigan Bell had provided entrance facilities for some time, and had been charging the CLECs regulated (TELRIC) rates for use of those entrance facilities. But, in light of the *TRRO*, Michigan Bell decided that it would henceforth charge higher (i.e., competitive) rates for the entrance facilities it was providing.[5] Thus, Michigan Bell notified the CLECs that it would be changing the "interconnection agreements" to reflect this new pricing scheme.

The CLECs, none too pleased with this impending price increase, responded by complaining to the MPSC, arguing that (regardless of the other paragraphs in the *TRRO*) paragraph 140 dictates that the CLECs are still entitled to use the entrance facilities at TELRIC rates for purposes of interconnection with the ILEC network. The MPSC

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facilities" as opposed to those "entrance facilities" from which it has just drawn a distinction.

[5] Michigan Bell continued to provide *interconnection* with its network at regulated (TELRIC) rates, as required by the statute and regulations, and nothing in the record suggests otherwise. Michigan Bell simply understood the *TRRO* to mean that an "entrance facility" is different from an "interconnection facility," such that, so long as it provides an "interconnection facility" at TELRIC rates, it can also offer an "entrance facility" (i.e., a different apparatus) at competitive rates, should it choose to do so.

agreed and ordered Michigan Bell to continue to provide entrance facilities at TELRIC rates. The parties refer to this as the "September Order."

Michigan Bell appealed to the district court, which agreed with Michigan Bell (i.e., disagreed with the MPSC's interpretation of the *TRRO* and reversed the September Order, explaining:

> Th[is] [c]ourt agrees with [] Michigan [Bell] and concludes that the September Order[,] which pertains to this issue[,] does not comply with the rules that were adopted by the FCC pursuant to Section 251. It is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule. The meaning of ¶ 140 must be interpreted in light of the FCC rule, which provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis. The *TRRO* conveys the finding by the FCC that entrance facilities should be offered competitively. A review of the ruling by the MPSC reveals that the September Order does not comply with this directive, and, accordingly, must be set aside.

Mich. Bell Tel. Co. v. Lark, No. 06-11982, 2007 WL 2868633, at *7 (E.D. Mich. 2007).

Both the CLECs and the MPSC commissioners appealed the decision to this court, raising one issue for review. In addition, the FCC and Verizon have submitted briefs as *amicus curiae*.

II.

"When a district court's decision on summary judgment is the result of a review of a state administrative body's ruling, *de novo* review requires that the proper standard of review of the underlying state administrative ruling be applied." *Quick Commc'ns, Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 584 (6th Cir. 2008). That is, we review *de novo* the question of whether the MPSC's order violated the Telecommunications Act, but we may overturn the MPSC's findings of fact and state law only if those findings were arbitrary and capricious. *Id.* Because the present case involves no findings of fact or determinations of state law, review in this case is entirely *de novo*.[6]

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[6] The dissent reviews the present case through the prism of *Auer* deference, through which a federal agency's interpretation of its own ambiguous regulation — even an interpretation presented in an *amicus* brief — is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quotation marks and citations omitted); *Coeur Alaska, Inc. v. Se. Alaska Cons. Council*, 557 U.S. —, 129 S. Ct. 2458, 2470 (2009). The Supreme Court has since added two additional limitations: (1) a "near equivalence of the statute and regulation belies the [applicability of] *Auer* deference," *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006); and (2) an agency cannot "under the guise of interpreting a regulation . . . create *de facto* a new regulation," *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting); *Rosales-Garcia v. Holland*, 322 F.3d 386, 403 n.22 (6th Cir. 2003) (*en banc*). And, the Seventh

Circuit has expressed some skepticism about the applicability of *Auer* deference to *amicus* briefs at the circuit court level, explaining:

> It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself, and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

Keys v. Barnhart, 347 F.3d 990, 993-94 (7th Cir. 2003) (citations omitted).

The dissent relies on the FCC's *amicus* brief to this court (submitted upon our request), in which the FCC offers an interpretation of the *TERO*, which is itself an "interpretive rule" and not a true "regulation." *See A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 768 (6th Cir. 2002) ("An interpretative rule is a rule that clarifies or explains an existing law or regulation.", "[I]nterpretative rules fall within an exception to the [Administrative Procedures] Act and do not require notice and comment."). For these reasons alone, one might legitimately question the applicability of *Auer* deference in this appeal. *See Keys*, 347 F.3d at 993-94; *Coeur*, 129 S. Ct. at 2479 (Scalia, J., concurring) ("*Auer*, however, stands only for the principle that we defer to an agency's interpretation *of its own ambiguous regulation*." (emphasis in original)); *Boose v. Tri County Metro. Transp. Dist.*, 587 F.3d 997, 1005 (9th Cir. 2009) ("We will not, under the guise of deference, engage in an end run around notice-and-comment rulemaking.").

But, as will be addressed in the body of this opinion, even ignoring these questions of *Auer*'s applicability, we find *Auer* deference unavailing in this appeal because the FCC's proffered interpretation is so plainly erroneous or inconsistent with the regulation, *see Auer*, 519 U.S. at 461, that we can only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation, *see Christensen*, 529 U.S. at 588. We therefore decline the dissent's invitation to apply *Auer* deference to *amici* FCC's position in this appeal.

The key statutory provisions in this case involve "interconnection" and specify that "each incumbent local exchange carrier [i.e., ILEC] has the following duties:"

> (2) Interconnection The duty to provide, for the facilities and equipment of any requesting telecommunications carrier [i.e., CLEC], interconnection with the local exchange carrier's [i.e., ILEC's] network —
>
> > (A) for the transmission and routing of telephone exchange service and exchange access;
> >
> > (B) at any technically feasible point within the carrier's network;
> >
> > (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> >
> > (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms

> and conditions of the agreement and the requirements of this section and § 252.[7]

(3) Unbundled access — The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and § 252 of this title.[8] An incumbent local exchange carrier shall

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[7] The pertinent provision of § 252 is the "pricing standards" provision, which states:

> Interconnection and network element charges — Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of § 251(c)(2), and the just and reasonable rate for [use of or access to the ILEC's] network elements for purposes of § 251(c)(3) shall be based on the cost (determined without reference to a rate of return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable) and nondiscriminatory, and may include a reasonable profit.

47 U.S.C. § 252(d) (statutory citation form altered). This was the origin of, and now means, TELRIC rates.

[8] See the foregoing footnote.

> provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c). Thus, § 251(c)(2) requires the ILEC "to provide . . . interconnection with [its] network" to the CLEC (i.e., "for the [CLEC's] facilities and equipment"), whereas § 251(c)(3) requires the ILEC "to provide . . . any requesting [CLEC with] nondiscriminatory access to [i.e., use of] [its] network elements on an unbundled basis." But the statute further specifies:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the [FCC] shall consider, at a minimum, whether . . . the [ILEC's] failure to provide access to such network elements *would impair the ability* of the [CLEC] to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2)(B) (emphasis added). This is the basis for the "impairment analysis."

The FCC has promulgated implementing regulations, at least two of which are pertinent here, the first being its "interconnection" regulation, which tracks 47 U.S.C. § 251(c)(2) (quoted above):

> An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier,

> interconnection with the incumbent LEC's network:
>
> > (1) For . . . telephone exchange traffic . . .
> >
> > (2) At any technically feasible point within the [ILEC]'s network . . .
> >
> > (3) That is at a level of quality [used by the ILEC itself] . . .
> >
> > (4) On terms and conditions that are just. . . .

47 C.F.R. § 51.305. The FCC's other pertinent regulation — its counterpart to its "interconnection facility" requirement — is its rule that ILECs are *not obligated* to provide "entrance facilities":

> Entrance facilities. An incumbent LEC [i.e., ILEC] is not obligated to provide a requesting carrier [i.e., CLEC] with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers [i.e., an 'entrance facility'].

47 C.F.R. § 51.319(e)(2)(i). Recall that "[b]undling is about lease pricing," and "[t]o provide a network element 'on an unbundled basis' is to lease the element . . . to a requesting carrier at a stated price [i.e., TELRIC rates] specific to that element." *Verizon*

Comme'ns, Inc. v. FCC, 535 U.S. 467, 531 (2002). So, this provision could be rewritten as: an ILEC is not obligated to provide entrance facilities at TELRIC rates. Or, stated in positive terms: an ILEC can charge competitive rates for the use of its entrance facilities. The resulting inference is that the ILEC is not obligated to provide an entrance facility at all if it is inconvenient (or unprofitable) to do so. *See, e.g., USTA II*, 359 F.3d at 586 ("If (as appears) [entrance facilities] exist exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them . . . .")).

All of this brings us to the *TRRO*: what it says and what it means. In the part of the *TRRO* that addressed entrance facilities (and its analysis thereof), the FCC stated:

> **D. Entrance Facilities**
>
> **136.** In the *Local Competition Order*, the [FCC] defined dedicated transport as:
>
> > incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or

> requesting
> telecommunications
> carriers.

The [FCC] reaffirmed this definition, which encompassed entrance facilities (the transmission facilities that connect competitive LEC networks with incumbent LEC networks), in the *UNE Remand Order*. In the *Triennial Review Order*, we revised the definition of dedicated transport to exclude entrance facilities. We determined that entrance facilities 'exist outside the incumbent LEC's local network' and should therefore — given section 251's focus on competition within the local network — be excluded from the definition of dedicated transport. We also limited the definition of dedicated transport to 'those transmission facilities connecting incumbent LEC switches and wire centers within a LATA.' Reviewing the *Triennial Review Order*, the *USTA II* court indicated that our exclusion of entrance facilities from the definition of dedicated transport was at odds with the definition of 'network element' found in section 153(29) of the Act. Specifically, the court found that we erred in excluding these facilities from the definition of dedicated transport for purposes of implementing the section 251 unbundling obligation. The court noted, moreover, that '[i]f entrance facilities are

correctly classified as 'network elements,' an analysis of impairment would presumably follow.'

137. The *USTA II* court did not reject our conclusion that incumbent LECs need not unbundle entrance facilities, only the analysis through which we reached that conclusion. In response to the court's remand, we reinstate the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities, but we find that requesting carriers are not impaired without unbundled access to entrance facilities.

138. As the court suggested, we now conduct an impairment analysis with respect to entrance facilities and find that the economic characteristics of entrance facilities that we discussed in the *Triennial Review Order* support a national finding of non-impairment. Specifically, entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. As we noted in the *Triennial Review Order*, entrance facilities are used to transport traffic to a switch and often represent the point of greatest aggregation of traffic in a competitive LEC's network. Because of

this aggregation potential, entrance facilities are more likely than dedicated transport between incumbent LEC offices to carry enough traffic to justify self-deployment by a competitive LEC. Moreover, competitive LECs have a unique degree of control over the cost of entrance facilities, in contrast to other types of dedicated transport, because they can choose the location of their own switches. For example, they can choose to locate their switches close to other competitors' switches, maximizing the ability to share costs and aggregate traffic, or close to transmission facilities deployed by other competitors, increasing the possibility of finding an alternative wholesale supply. In addition, they often can locate their switches close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities.

139. The record in this proceeding also demonstrates that competitive LECs are increasingly relying on competitively provided entrance facilities. BellSouth notes, for example, that between October 2003 and September 2004, 10 percent to 20 percent of the entrance facilities it had provided to competitive LECs were replaced by facilities obtained from other sources. Verizon states that between early 2003 and mid-2004, it migrated more than 32,000 entrance facility

circuits to non-Verizon facilities. No commenters in this proceeding have disputed this evidence, which indicates that wholesale alternatives to entrance facilities provided by incumbent LECs are widely available. And it appears that incumbent LECs and competitors alike continue to agree that entrance facilities are more competitively available than other types of dedicated transport.

140. We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these [interconnection] facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

141. The evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities. We also conclude that it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport. As we have explained, entrance facilities are characterized by unique operational and

> economic characteristics that justify separate treatment: they are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. For these reasons, we do not apply our test for other types of dedicated transport to entrance facilities.

TRRO, 20 FCC Rcd. 2533, 2005 WL 289015, ¶¶ 136-141 (footnotes omitted).

In one sense, the question in this appeal concerns this passage from the *TRRO*: what does it say and what does it mean? And the parties' disagreement as to the meaning is central to the present dispute. So, let us begin by restating it, as clearly and succinctly as we can, and then proceed to what it means. Based on our plain reading, we find the most plausible "translation" to be:

> **136**. *In our last order, we drew two conclusions from a single premise:*
>
> | | |
> |---|---|
> | *Premise:* | *Entrance facilities are not even a part of (i.e., not 'within') the ILEC's network. Therefore:* |
> | *First Conclusion:* | *Entrance facilities do not need to be unbundled; and* |

Second Conclusion: We do not even need to conduct an impairment analysis on entrance facilities.

Alas, when the USTA II court considered this proposition, it rejected our premise and our second conclusion.

137. *But the USTA II court did not reject our first conclusion, and we now reach that same conclusion again, albeit for a different reason.*

138. *There is nothing monopolistic about entrance facilities. If you are a CLEC and you don't like the rates the ILEC is charging for use of its entrance facility, then build your own (or lease it from another CLEC that has built its own).*

139. *Other CLECs are certainly doing that (i.e., building their own).*

140. *And, rest assured, if you build your own entrance facility, the ILEC must still let you hook it up to its network (i.e., use its "interconnection facility") at wholesale rates.*

141. *Therefore, entrance facilities need not be provided at TELRIC rates.*

So, the question becomes: does this mean what it says? The appellants contend that it does not. But, to find a

different meaning, it is necessary to complicate this discussion considerably. That is, the appellants — the FCC, the MPSC Commissioners, and the CLECs — complicate this considerably. Before explaining their position, however, we think a simple analogy may be helpful.

Suppose you lived next to a public park that had no electrical hook-up of its own. And suppose that the village elders decided that, rather than installing an electrical hookup in the park, they would allow park-goers to hook up to your electricity at your house (and because they compensated you enough to cover the added electricity usage plus a tidy profit, you eagerly agreed). Thereafter, when park-goers arrived at the park needing electricity, you allowed them to plug into an electrical outlet in your garage. This outlet is the "interconnection facility."

But, after a few days of having park-goers trample across your yard and enter your garage to plug into the electrical outlet on the wall inside the garage, you decide to buy one of those big orange extension cords, plug it into the outlet in your garage, and run it across your yard and into the park. This makes access to the electricity closer to (and hence more convenient for) the park-goers, and they are no longer trampling your yard or entering your garage. And note, because park-goers can still plug into the outlet in your garage if they want to (i.e., they need not plug into the big orange extension cord if they don't want to), the big orange extension cord is an "entrance facility" and the outlet in your garage remains the "interconnection facility." Even if *all* the park-goers are plugging into the big orange extension cord, the cord is still an

entrance facility. The interconnection facility remains the outlet in the garage so long as the park-goers *could* plug in there if they wanted to.

As more park-goers arrive, you might put out a second big orange extension cord (i.e., a second "entrance facility"). And suppose that, at this point, all the park-goers are happily plugged into the big orange extension cords. Now suppose that a couple more park-goers arrive with their own big orange extension cords ("entrance facilities"), wanting to hook up to your electricity (as is their right). So, you get one of those surge protectors with six or eight plug-ins, plug it into the outlet in the garage, and plug your two big orange extension cords, as well as the two new park-goers' extension cords, into this surge protector. The big orange extension cord would still be the entrance facility, but the outlet in the surge protector would now be the "interconnection facility." By forcing the park-goers to plug into the surge protector (rather than the wall outlet), you have moved the "interconnection facility." (And here is a critical aside: if you forced the park-goers to plug in to the big orange extension cord — and forbade them from plugging into the wall outlet (or the surge protector) — the big orange extension cord would become the "interconnection facility." But, to ease the analogy, let's just assume you allowed them to plug into the surge protector.[9]

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[9] Of course, this aside is the very aside that confuses this whole situation in the present case — the FCC, MPSC, CLECs, and dissent argue (and two courts have agreed) that an "entrance facility" is an "interconnection facility" just because a CLEC can, could, or would use it to interconnect to the ILEC network. That is, they would argue that a big orange extension cord is an "interconnection facility" because the park-goers could or would

Now, some time later, you need a big orange extension cord for some other purpose (let's say, Christmas lights), but the park-goers are using your extension cords. So, you tell the park-goers that you are either going to take the extension cords back or charge for their use, so that you can buy yourself a new one. But the park-goers complain to the village that they were promised electricity and now you won't give it. The village elders think it over and decide that you are right: the electricity they promised did not include free use of your big orange extension cords, so they say:

> **138**. There is nothing special about big orange extension cords. If you parkgoers don't like the rate that the homeowner is going to charge you to use her extension cords (i.e., 'entrance facilities'), then bring your own (or lease one from another park-goer who has brought his or her own, if you can get a better deal).

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use it to interconnect with the electrical outlet in the garage. But all of that misses the point, which is not whether the park-goers "can" use it to interconnect, but whether they "must." If you, as the homeowner, had said that they may plug into the surge protector, then the big orange extension cord is just an "entrance facility." But, if you had said they must plug into the big orange extension cord, then the big orange extension cord becomes the "interconnection facility" and, consequently, the park goers may plug into it for free, under your agreement with the village to provide them with electricity. So it goes with the ILECs and CLECs — only when the ILEC says that the CLEC *must* connect at the entrance facility would that entrance facility become an interconnection facility (and, consequently, require TELRIC rates). All of this is beside the point, however, because nothing in the record suggests that Michigan Bell has told the CLECs that they *must* connect at a purported entrance facility.

> **139**. Other park-goers are certainly doing that (i.e., bringing their own extension cords).
>
> **140**. And, rest assured, if you bring your own big orange extension cord (i.e., 'entrance facility'), the homeowner must still let you plug it into her surge protector (i.e., her 'interconnection facility') at no cost, just as you were doing before.
>
> **141**. Therefore, the homeowner need not provide big orange extension cords (i.e., 'entrance facilities').

That all seems simple enough.

And it appears just as simple when we apply this analogy to the facts of our case. Michigan Bell offers each CLEC both an interconnection facility and an entrance facility. So long as Michigan Bell offers an interconnection facility at TELRIC rates (and in compliance with 47 C.F.R. § 51.305), it may charge competitive rates for the use of its entrance facilities. Correspondingly, the CLEC may connect directly to the interconnection facility (at TELRIC rates), connect to Michigan Bell's entrance facility (at Michigan Bell's competitive rate), or connect to a third party's entrance facility (at the third party's rate).

But the MPSC Commissioners, the CLECs, the dissent, and the two Circuit Courts to have considered this all see it another way. They explain that entrance

facilities are used for two purposes: (1) to carry communications among CLEC customers (i.e., backhauling); and (2) to interconnect the CLEC to the ILEC network. And, relying on this — otherwise unmentioned[10] — premise, they argue that ¶¶ 137, 138,

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[10] The dissent contends that "backhauling" is not only mentioned, but that certain footnotes in the *TRRO*, ¶ 138 n.389 and ¶ 141 n.396, "draw that precise distinction" between backhauling and interconnection. Dis. Op. at ¶ 14. This is an overstatement of the *TRRO* and a misapprehension of the *TRO* as it is relied upon in those footnotes. First, the footnotes, which state in their entireties:

> **¶ 138, n389.** [*TRO*, 18 FCC Rcd. 16978] at 17204-05, para. 367. The record contains evidence that competitive LECs are able to obtain entrance facilities from third-party providers. *See* NuVox Comments, Exh. A, Declaration of Keith Coker (NuVox Coker Decl.) at para. 3 ("[W]here available, NuVox utilizes third-party providers for **backhaul** from NuVox collocation arrangements to NuVox switches.")
>
> **¶ 141 n.396.** *See Triennial Review Order*, 18 FCC Rcd at 17204, para. 367 ("[T]he economics of dedicated facilities used for **backhaul** between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction.") We thus reject commenters' suggestions that entrance facilities should be subject to the same test that applies to dedicated transport between incumbent LEC facilities. *See* AT&T Comments at 50-52; Loop Transport Coalition Comments at 87; ATX, Bayring, et al. Reply at 48; McLeod Reply at 37.

TRRO, 20 FCC Rcd. 2533, 2005 WL 289015 (Feb. 4, 2005) (emphasis added).

and 141 say that the ILEC can charge competitive rates for the first use (i.e., backhauling), but ¶ 140 says that the ILEC must charge TELRIC rates for the other use (i.e., interconnection with the ILEC network). So, to complete our analogy, suppose a park-goer had taken the homeowner's big orange extension cord, strung it over a tree branch, and connected a light to the dangling end (resulting in a light dangling from the tree branch, via the big orange extension cord). Under this separate-use theory, the homeowner could charge the park-goer to use the extension cord for the purpose of holding the light off the ground, but not for conveying the electricity to that light.[11]

The first thing to note is that these two, seemingly incidental, references to backhauling — within the context of six paragraphs and 23 footnotes — are hardly the paragons of "precise distinction" the dissent suggests. The second thing to note is that the FCC's reference to backhauling in the *TRO* ¶ 367 was not in support of a separate-use theory, but rather, was in support of the separate-facilities scheme we have explained throughout this opinion. Specifically, the FCC used this distinction to support its position (since reversed) that entrance facilities are not even part of the ILEC's network, and therefore would not require any impairment analysis at all. *See TRO* ¶ 366 n. 1116 ("Our determination here effectively eliminates 'entrance facilities' as [unbundled network elements] and, therefore, moots the [FCC's pending notice of proposed rule making] insofar as it proposes limitations on obtaining entrance facilities as UNEs.") (overruled by *USTA II*, 539 F.3d 554).

[11] At this point, as we are about to abandon this big-orange-extension-cord analogy, we invite you to return momentarily to the foregoing paragraph, in which we restated *TRRO* ¶¶ 138-141 in terms of this analogy, and attempt to reconcile this separate-use theory with the statement in those paragraphs (138-141). It cannot be done. Similarly, the backhauling separate-use theory simply cannot be reconciled with the plain language of *TRRO* ¶¶ 138-141.

This separate-use theory requires several assumptions, none of which is easily defended. First, it requires us to assume that the FCC used two separate terms — "entrance facility" and "interconnection facility" — to describe the same exact wire, without any explanation why.[12]

We should also, at this point, pause to address the dissent's two corollaries to this hypothetical: its "meet-point" and its "collocation" examples. The first is incorrect and the second is inapposite. The dissent says that "[a]n incumbent's portion of a meet-point facility, it turns out, is merely one manifestation of an entrance facility," Dis. Op. at ¶ 8, but that is simply untrue. An ILEC's portion of a meet-point facility — as described by the dissent and the regulations — is an "interconnection facility," whereas the CLEC's portion of the meet-point is an "entrance facility." The meet-point example fits perfectly within our framework. (For further explanation, see the next footnote.) The dissent also cites the "collocation" example. This is one of virtually limitless examples of an analogy being an imperfect fit, as would be the case with any analogy. As for the question of whether an interconnection facility is distinct and different from an entrance facility, however, this collocation example is wholly irrelevant.

[12] This assumption is the crux of the dissent's principal argument — that interconnection facilities and entrance facilities are really one and the same because "[e]ntrance facilities come within the ordinary meaning of a 'technically feasible method of obtaining interconnection.'" Dis. Op. at ¶ 7 (quoting 47 C.F.R. § 51.321(a)). That is, the dissent "reasons" that because ILECs must "provide . . . any technically feasible method of obtaining interconnection" at cost-based rates, *see* 47 C.F.R. § 51.321(a), and because entrance facilities are a technically feasible method of obtaining interconnection, the ILECs must therefore provide entrance facilities at cost-based rates.

We reject this argument for at least three reasons. First, this directly contradicts 47 C.F.R. § 51.319(e)(2)(i), which says that an ILEC is *not* obligated to provide entrance facilities at cost-based rates. Second, at least in our view, entrance facilities are not actually a "technically feasible means of obtaining

Second, it requires us to assume that the FCC used "entrance facility" to refer to a particular use of that wire (i.e., for purposes of transporting data among CLEC customers (backhauling), rather than between the CLEC and ILEC),[13] even though the FCC has never

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interconnection" because they do not connect the CLEC with the ILEC network directly; entrance facilities, when used, connect the CLEC with the interconnection facility (i.e., ILEC o Interconnection Facility o Entrance Facility o CLEC). And finally, even if entrance facilities were a technically feasible method of interconnection, 47 C.F.R. § 51.321(a) does not require the ILEC to provide an entrance facility rather than some other ("any"other) technically feasible means. The dissent's logic is flawed. Suppose, for example, a public school system was obligated to provide school children with a feasible means of transportation to and from school. A limousine is a feasible means of transportation — indeed, some children, at least on television, take limousines to and from school. So, by the dissent's logic, the school system would be obligated to provide limousines because limousines are a feasible means of transportation.

[13] The dissent eagerly accepts this assumption, suggesting that the *TRO* and the *TRRO* should be read in conjunction and arguing that the *TRO* establishes the separate-use distinction between backhauling and interconnection. Dis. Op. at ¶ 15.

"Why [else]," the dissent exclaims, "would the FCC clutter its unbundling analysis [in the *TRO*] by stressing the distinction between backhauling and interconnection?" Dis. Op. at ¶ 15 (citing *TRO* ¶ 365). If we treat this as a real inquiry, and not a rhetorical argument, the answer is plain. The FCC took an entirely different approach in the *TRO* — an approach that was later rejected by *USTA II* and reconsidered in the *TRRO* — in which it held that entrance facilities (no matter their use) were outside of the ILEC's network, so no impairment analysis was even necessary.

In the paragraph cited by the dissent (*TRO* ¶ 365), the FCC drew a distinction between interconnection facilities and entrance facilities, albeit without using those terms. In fact, the FCC did not use the phrase "interconnection facility" anywhere in the

TRO; that is a phrase new to the *TRRO*. In the *TRO*, the FCC referred to what it now calls "interconnection facilities" as "interconnection points" (*see, e.g.*, *TRO* ¶¶ 7, 350 n.1058, 367 n.1120), designated certain types of these points (e.g., single point of interconnection (SPOI), minimum point of entry (MPOE)), and grouped these points by description as "the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection" (*TRO* ¶ 365). The FCC did not use the phrase "interconnection *points*" anywhere in the *TRRO*; it used the phrase "interconnection *facilities*." *See, e.g.*, *TRRO* ¶ 140. On the other side of that distinction, the FCC — in the *TRO* — described "entrance facilities" as "transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *TRO* ¶ 365. So, the distinction between backhauling and interconnection is, again, not between *uses* but between *facilities*. The paragraph states, in pertinent part:

> [I]n order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link [i.e., an entrance facility] from the UNEs on the incumbent LEC network [i.e., interconnection facility] to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks [i.e., entrance facilities] both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection [i.e., interconnection facilities], we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic [i.e., entrance facilities].

defined entrance facility that way. *See TRRO* ¶ 136 ("entrance facilities [are] the transmission facilities that connect competitive LEC networks with incumbent LEC networks"); 47 C.F.R. § 51.319(e)(2)(i) ("Entrance facilities [are] . . . dedicated transport that does not connect a pair of incumbent LEC wire centers").

Third, it requires us to assume that the FCC used the term "interconnection facility" to refer to a particular use of that wire (i.e., for purposes of transporting data between the CLEC and ILEC, rather than among CLEC customers), even though neither the FCC nor any court has ever defined interconnection

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TRO ¶ 365 (footnote omitted). This same paragraph would read as follows if it were translated into the terms of the *TRRO* (i.e., using the phrases "entrance facility" and "interconnection facility"):

> In order to access the ILEC network, CLECs need a transmission link from the ILEC's interconnection facility to their own equipment located elsewhere, and this is called an "entrance facility." CLECs use these entrance facilities both for interconnection with the interconnection facility and to backhaul traffic. Unlike "interconnection facilities," which ILECs must make available for interconnection, the Act does not require ILECs to provide these "entrance facilities."

So, returning to the dissent's question: "Why . . . would the FCC clutter its unbundling analysis by stressing the distinction between backhauling and interconnection?" Dis. Op. at ¶ 15 (citing *TRO* ¶ 365). The answer is clear: to describe and differentiate two types of *facilities* for which it had not yet established names. And, "Why would [the FCC] underscore the incumbents' continuing obligation to provide interconnection facilities?" Dis. Op. at ¶ 15. Because interconnection facilities and entrance facilities are different things.

that way. *See Local Competition Order*, 11 FCC Rcd. 15499, 1996 WL 452885, ¶ 176 (Aug. 8, 1996) ("the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks"); *AT&T Corp. v. FCC*, 317 F.3d 227, 234 (D.C. Cir. 2003) ("to 'interconnect' and to exchange traffic have distinct meanings"; interconnect "refers only to 'facilities and equipment,' not to the provision of any service"); *Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997) ("Congress intended 'for the transmission and routing of telephone exchange service and exchange access' only to describe what the interconnection, the physical link, would be used for. . . . By its own terms, this reference [to interconnection] is to a physical link, between the equipment of the carrier seeking interconnection and the LEC's network.").

Finally, it requires us to assume that when Congress used the phrase "provide . . . interconnection *with* the [ILEC]'s network," 47 U.S.C. § 251(c) (emphasis added), Congress actually meant that the ILEC is obligated to "lease a physical facility (or wire)" *to* the CLEC rather than merely "make a plug-in available" *for* connection with the CLEC's facilities and equipment, even though this is an unnatural reading of the phrase, with no support in the statute.

In *Illinois Bell Telephone Co. v. Box*, 526 F.3d 1069, 1071-72 (7th Cir. 2008), the Seventh Circuit considered this issue and held that "[w]hat the FCC said in ¶ 140 is that ILECs must allow use of entrance facilities for interconnection at 'cost-based rates.'" But, the Seventh Circuit began its analysis by assuming the very question to be decided, stating:

> In the [*TRRO*], the FCC concluded that CLECs do not need entrance facilities *for backhauling* and should build their own equipment *for handling CLEC-to-CLEC traffic*. ILECs need not provide unbundled network elements to CLECs that can serve customers without 'impairment' through their own network elements. No one contests the FCC's conclusion in this litigation.

Id. at 1071 (citation omitted; emphasis added). But, these two[14] qualifiers — "for backhauling" and "for handling CLEC-to-CLEC traffic" — are nowhere to be found in the text of the *TRRO* passage at issue here. The Seventh Circuit added these, without explanation or justification.

If we remove those qualifiers from this passage, we have an interpretation of ¶ 140 that is both drastically different from the Seventh Circuit's and true to the plain language of the *TRRO*:

> In the *TRRO*, the FCC concluded that CLECs do not need [ILECprovided] entrance facilities ~~*for backhauling*~~ and

---

[14] Obviously, this is actually just one qualifier, inasmuch as "for handling CLEC-to-CLEC traffic" is the definition of "backhauling," and why the Seventh Circuit used two separate labels is unclear — other than as a show of solidarity with the FCC and its claim that it used two separate labels for the same wire: "entrance facility" and "interconnection facility." In any event, we note them separately here to emphasize that neither term is actually included in the *TRRO* passage at issue here, nor is either term clearly connected to this passage when used elsewhere in the *TRRO*.

> should build their own [entrance-facility] equipment ~~*for handling CLEC-to-CLEC traffic*~~. ILECs need not provide unbundled network elements to CLECs that can serve customers without 'impairment' through their own network elements. No one contests the FCC's conclusion in this litigation.

Thus, we cannot join the Seventh Circuit's interpretation of the *TRRO*.

Using its qualifier-filled interpretation of ¶ 140 of the *TRRO*, the Seventh Circuit declared that this is the proper reading of the *TRRO* because this is what the FCC said in the *TRRO*. But the Seventh Circuit's "reasoning" is entirely circular. It said:

> AT&T protests that [by making entrance facilities available at TELRIC rates to the CLECs for interconnection, the state commission] nullifies the FCC's order. What's the point of specifying that CLECs cannot demand access to entrance facilities as unbundled network elements, AT&T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that CLECs do not enjoy the 'same' access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then CLECs could use entrance facilities for both interconnection and backhauling. Under the state's order, CLECs use entrance

> facilities exclusively for interconnection, *just as the FCC said in ¶ 140.*

Id. (emphasis added). But once we omit the unexplained and unjustified qualifiers, and thereby remove the artificial distinction that they create (between backhauling and interconnection), it becomes clear that the act of making entrance facilities available at TELRIC rates for interconnection (but not backhauling) is insupportable inasmuch as its sole support (i.e., *TRRO* ¶ 140) actually says no such thing. Consequently, we reject both the premise and the conclusion in *Illinois Bell*.

In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 530 F.3d 676, 683-84 (8th Cir. 2008), the Eighth Circuit considered this issue and reached the same conclusion as the Seventh Circuit. After acknowledging the clear statement in the *TRRO* that CLECs are not impaired without access to entrance facilities, the Eighth Circuit turned right around and asserted that this finding "does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic." *Id.* Without further explanation or justification (other than a "see" cite to *Box*, 526 F.3d at 1071-72), the court asserted:

> The FCC determined [that] when a CLEC uses entrance facilities to carry traffic to and from its own end users, i.e., backhauling or CLEC to CLEC, the CLEC is not entitled to obtain entrance

> facilities as UNEs at TELRIC rates. If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC. Thus, CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network.

Id. But, as with *Box*, this conclusion is only true if the (assumed) premise is true, and it is not — the FCC made no backhauling distinction in the *TRRO* and the FCC has not said that CLECs have a right to entrance facilities for some purposes but not others. The FCC has said that ILECs have no obligation to provide entrance facilities at TELRIC rates. *See* 47 C.F.R. § 51.319(e)(2)(i).

We do not find these two cases persuasive. The most plausible reading of the plain language of the *TRRO* is that the ILEC must allow the CLEC to connect its network to the ILEC's network, and may not charge the CLEC more than TELRIC rates for this connection. If the ILEC requires the CLEC to connect at some point other than directly into its network, then the link (or "bridge" if the word "bridge" provides a better image) between the ILEC's designated connection point and the ILEC's network is what *TRRO* ¶ 140 refers to as an "interconnection facility," and the ILEC may charge only TELRIC rates for the use of that (or any) interconnection facility.

Any facility (link, "bridge," etc.) outside of the ILEC's designated connection point (i.e., the link that connects the CLEC to the ILEC's designated connection point, and from there to the ILEC network

via the ILEC's interconnection facility), is *not* itself an "interconnection facility"; it is an "entrance facility." Obviously, the CLEC would ultimately be using the entrance facility to connect its network with the ILEC's network (through the designated point, via the interconnection facility), but that is wholly immaterial. The material distinction is not between interconnection and some other use (e.g., backhauling); the material distinction is between the ILEC's side of the designated connection point (i.e., the "interconnection facility") and the CLEC's side of the designated connection point (i.e., the "entrance facility").

Moreover, the ILEC most assuredly has *no obligation to provide any entrance facility* and the CLEC has no obligation to use the ILEC's entrance facility (the CLEC can connect directly to the interconnection facility, rent someone else's entrance facility, or build its own entrance facility). Of course, if the ILEC chooses to provide an entrance facility, it must provide it *in addition to* the interconnection facility, *not instead of* the interconnection facility (as that would effectively change the designated connection point and transform the purported "entrance facility" into an "interconnection facility"). And, if the CLEC chooses to use the ILEC's entrance facility, it must pay the rates determined by the ILEC, in competition with other providers.

As we understand the situation in the case before us, the ILEC (Michigan Bell) offers its CLECs an interconnection facility at TELRIC rates and entrance facilities at competitive rates, which is in perfect accordance with the plain language of the *TRRO*. The MPSC ordered Michigan Bell to offer the

CLECs the use of its entrance facilities at TELRIC rates, and based this order on its mistaken belief that *TRRO* ¶ 140 requires Michigan Bell to treat its entrance facilities as interconnection facilities any time the CLECs ultimately use them for interconnection. The district court rejected the MPSC's reading of the *TRRO*, and we agree with the district court's view.

III.

For all of the foregoing reasons, we **AFFIRM** the judgment of the district court.

DISSENT

SUTTON, Circuit Judge, dissenting. The majority admirably pieces together the statutory, regulatory and technical components of this complicated case. Together, the majority concludes, they show that the duty of the incumbent telecommunication provider, Michigan Bell, "to provide . . . interconnection with [its] network" to competitors at cost-based rates, 47 U.S.C. § 251(c)(2), requires only that Michigan Bell provide competitors with a place to plug into its local telephone network and that "entrance facilities" fall outside of this interconnection obligation. That may be a reasonable interpretation. So too, however, is the FCC's competing interpretation, one premised on an interpretation of its own regulations and one that we must respect as a result. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). I accordingly respectfully dissent.

Prior to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, incumbent local telephone companies, such as Michigan Bell, enjoyed a natural monopoly. The high fixed costs of recreating a local telephone network, including running wires to each home and business in a community, together with the low marginal cost of operating a pre existing network gave incumbents "an almost insurmountable competitive advantage." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 490 (2001). To combat these monopolies, the 1996 Act mandates that incumbents share their network with competitors at cost-based rates. *See id.* at 489; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

As part of this sharing obligation, incumbents must lease certain elements of their network to competitors on an "unbundled"—a la carte—basis and must do so at costbased rates. 47 U.S.C. § 251(c)(3), (d)(2). That allows a competitor to connect its network with other phone networks, to provide enhanced services to its customers or to expand its network so it can reach a broader potential customer base. *See id.* § 153(29); *Triennial Review Order*, 18 F.C.C.R. 16978 ¶ 59 (2003); 47 C.F.R. § 51.319(a). The upshot of this duty is that, if a competitor wishes to offer phone service to everyone in a given community without incurring the up-front costs of running its own wire to each potential customer, the Act and implementing regulations facilitate the entrant's efforts by requiring the incumbent to offer these services on unbundled terms and at cost-based rates.

The Act imposes a related, but narrower, sharing obligation, one that also must be provided at cost-based rates. Incumbents must "provide . . . interconnection with [their] network" to competitors so customers on one network can seamlessly call customers on the other network. 47 U.S.C. § 251(c)(2); *see id.* § 251(d)(1); 47 C.F.R. § 51.5 (defining interconnection as the "linking of two networks for the mutual exchange of traffic"); FCC Br. at 4. In the absence of this obligation, no rational consumer would switch from the large incumbent to the competing entrant, at least without a steep discount. Who wants a local phone service that connects customers to just a handful of other individuals in the community? *See Verizon Commc'ns*, 535 U.S. at 490. By requiring cost-based rates for this service, the Act ensures that incumbents do not charge competition-dampening rates for interconnection, a not insignificant risk given that entrants need interconnection more than incumbents do.

Which brings me to "entrance facilities," the part of the network of the incumbent, Michigan Bell, at issue here. Entrance facilities physically link telecommunications networks together, *see Triennial Review Remand Order* (*TRRO*), 20 F.C.C.R. 2533 ¶¶ 136–39 (2005), and competitors use an incumbent's entrance facilities for two purposes: interconnection and backhauling. *See Triennial Review Order* ¶ 365. When used for interconnection, entrance facilities route traffic between one of the competitor's customers and one of the incumbent's customers. When used for backhauling, entrance facilities route traffic between two of the competitor's customers, likely because the competitor leases some elements of the incumbent's

network, rather than between a customer of the competitor and a customer of the incumbent. *See id.* ¶¶ 365, 367.

In deciding what incumbents may charge for the use of their entrance facilities, the FCC interprets its regulations to draw a distinction. On one side of the line, incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection. On the other side, incumbents may charge market-based rates, or not lease the facilities at all, when competitors use the facilities for backhauling. *See* FCC Br. at 15–17, 20. Everyone (at least everyone involved in this case) agrees that the FCC correctly concluded that incumbents may charge market-based rates for backhauling. What divides the parties is whether the FCC correctly concluded that incumbents cannot do the same for interconnection. In answering this question, we must keep in mind that Congress charged the FCC with administering § 251, *see* 47 U.S.C. § 251(d)(1), and the FCC wrote the regulations at issue, all of which means that the FCC's interpretation binds us unless it flouts the regulations' text. *See Auer*, 519 U.S. at 461.

The line drawn by the FCC permissibly interprets its own regulation. In elaborating on § 251(c)(2)'s duty to "provide . . . interconnection," the FCC's regulation says that incumbents must provide "any technically feasible method of obtaining interconnection" at cost-based rates. 47 C.F.R. § 51.321(a). Entrance facilities come within the ordinary meaning of a "technically feasible method of obtaining interconnection." They are "designed for the very purpose of linking two carriers' networks." *Ill. Bell Tel.*

Co. v. Box, 526 F.3d 1069, 1072 (7th Cir. 2008). And that is how competitors use them—to bridge the gap between their network and an interconnection point within the incumbent's network so that the two networks can mutually exchange traffic. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 586 (D.C. Cir. 2004).

In providing illustrative examples of an incumbent's interconnection duties in § 51.321, the FCC confirms that the regulation uses the phrase "method of obtaining interconnection" in its ordinary sense—one that applies to entrance facilities. One example says that incumbents upon request must interconnect with competitors through meet point facilities, *see* 47 C.F.R. § 51.321(b)(2), which requires the incumbent and competitor to build transmission facilities from their respective networks to a designated meet point and to link the two transmission facilities together at that point "for the mutual exchange of traffic," *Local Competition Order*, 11 F.C.C.R. 15499 ¶ 553 (1996). An incumbent's portion of a meet point facility, it turns out, is merely one manifestation of an entrance facility, as entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." *See TRRO* ¶ 136. Another example—dealing with collocation, which is installing and maintaining equipment for use solely by the competitor at an incumbent's physical facilities, *see* 47 C.F.R. § 51.5—also shows that an incumbent's duty to provide methods of obtaining interconnection covers facilities that aid in bridging the gap between two networks. *See* 47 U.S.C. § 251(c)(6) (mandating that incumbents allow physical or virtual "collocation of equipment

necessary for interconnection"); 47 C.F.R. § 51.321(b)(1).

To put all of this in context, it might help to return to the majority's extension cord analogy. The meet-point example is akin to saying that the homeowner sometimes must provide a park-goer with an extension cord, at a cost-based price, that links the outlet in the garage with the park-goer's extension cord, rather than forcing the park-goer to run an extension cord all the way from the park to the garage or forcing the park-goer to pay the homeowner market-based rates for the use of one of its cords. The collocation obligation is akin to saying that the homeowner sometimes must let park-goers store an extension cord on a reel in the garage and access the garage when they want to extend the cord from the garage to the park. As these examples show, an incumbent's interconnection duty encompasses more than providing competitors with an outlet to plug into.

The *Triennial Review Remand Order* does not undermine the FCC's position. The *TRRO* represents the FCC's fourth attempt to promulgate valid unbundling regulations, *see Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 531 (D.C. Cir. 2006), and it aims to satisfy the D.C. Circuit's concerns in setting aside the FCC's previous unbundling regulations, *see TRRO* ¶¶ 1–4, 13, 19–20. Nearly a quarter of the order clarifies the FCC's overarching unbundling analysis and not one paragraph discusses how the FCC analyzes interconnection obligations. *See id.* ¶¶ 20–65.

The one section that mentions entrance facilities confirms the *TRRO*'s focus on unbundling, not

interconnection. The section analyzes whether competitors would be "impair[ed]" without unbundled access to entrance facilities under § 251(c)(3), and it concludes that they would not be. *See TRRO* ¶¶ 136–41; *see also* 47 U.S.C. § 251(d)(2). Yet, as the FCC points out, an impairment analysis has no role to play under § 251(c)(2), *see* 47 U.S.C. § 251(d)(2); FCC Br. at 16, and the FCC has never, to my knowledge, considered impairment when analyzing an incumbent's interconnection obligations. *See Ill. Bell*, 526 F.3d at 1072 (noting that whether an incumbent can charge market-based rates for interconnection "is not related to the scope of an [incumbent's] obligations under § 251(c)(3) to furnish unbundled network elements"). It would be surprising, then, if the *TRRO* exempted entrance facilities from the pre-existing obligations of 47 C.F.R. § 51.321(a) through a novel analysis without comment.

The *TRRO*'s sole mention of interconnection in the context of entrance facilities instead sounds a cautionary note: No one should read the FCC's categorical unbundling analysis under § 251(c)(3) as affecting incumbents' interconnection duties under § 251(c)(2). *See TRRO* ¶ 140 (stating "our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)"). This cautionary note makes perfect sense if, as the FCC and both courts of appeals to address this issue have concluded, entrance facilities used for interconnection fall within § 251(c)(2)'s interconnection obligation. *See Ill. Bell*, 526 F.3d at 1071–72 ("What the FCC said in ¶ 140 is that [incumbents] must allow use of entrance facilities for interconnection at 'cost-

based rates'."); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676, 684 (8th Cir. 2008).

The regulations promulgated by the *TRRO*, moreover, discuss only unbundling obligations. They say that "in accordance with section 251(c)(3)"—the provision imposing the unbundling requirement—an incumbent "is not obligated to provide a requesting carrier with *unbundled access*" to entrance facilities. 47 C.F.R. § 51.319(e) (emphasis added); *see also TRRO*, 20 F.C.C.R. at 2682. This speaks only to an incumbent's unbundling obligation, not its narrower, independent duty to "provide . . . interconnection" under § 251(c)(2). Michigan Bell disagrees, claiming the regulation "unequivocal[ly]" states that incumbents have no obligation to provide entrance facilities, period. Michigan Bell Br. at 23. But this turns the phrase "with unbundled access" into a useless appendage. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59–60 (2007) (noting general rule that courts should give effect to all words in a provision).

Michigan Bell reads the *TRRO* differently. The *TRRO*, it says, draws no distinction between the functions of an entrance facility (backhauling versus interconnection), but instead draws a distinction between two distinct and mutually exclusive types of facilities (entrance versus interconnection). The text of ¶¶ 136–41, it is true, does not distinguish between backhauling and interconnection. But the footnotes to those paragraphs draw that precise distinction. *See TRRO* ¶¶ 138 n.389, 141 n.396. And even if the FCC had not drawn this functional line, that would not eliminate ambiguity about the point; the silence would create ambiguity, particularly since the FCC

consistently has drawn functional lines when implementing the 1996 Act. *See Triennial Review Order* ¶¶ 365–67; *Local Competition Order* ¶ 553. Either way, *Auer* deference applies to the FCC's position that those paragraphs draw a functional line that exempts incumbents only from the obligation to lease their entrance facilities at costbased rates when competitors use those facilities for backhauling, as opposed to interconnection.

Michigan Bell's competing interpretation also fits awkwardly with the *TRRO* and its predecessor, the *Triennial Review Order*. Why, if that interpretation is correct, would the FCC clutter its unbundling analysis by stressing the distinction between backhauling and interconnection? *See Triennial Review Order* ¶ 365. And why would it underscore the incumbents' continuing obligation to provide interconnection facilities? *See id.*; *TRRO* ¶ 140. These points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities.

To support its mutual exclusivity theory, the majority notes that incumbents may choose whether a facility counts as an entrance facility or an interconnection facility. If the incumbent requires that competitors interconnect at that facility, then it is an interconnection facility. But if the incumbent provides a facility that bridges the gap between the incumbent-designated interconnection point and the competitor's network, then it counts as an entrance facility. This premise, however, does not square with § 251(c)(2), which requires incumbents to "provide . . . interconnection" "at *any* technically feasible point within [its] network." 47 U.S.C. § 251(c)(2) (emphasis

added); *see also Local Competition Order* ¶ 209 (stating that § 251(c)(2) allows competitors "to select the points in an incumbent['s] . . . network at which they wish to deliver traffic"). And in the absence of this premise, I see no workable way to distinguish between these two supposedly distinct and mutually exclusive types of facilities.

One more point. While the majority's principal objection to this analysis is that the regulation is plain as day and thus leaves no room for administrative deference, it also suggests two reasons for ignoring *Auer* deference altogether. *First*, it cites a Seventh Circuit case, which suggests that agency *amicus* briefs (like the one filed here) should get *Auer* deference only at the Supreme Court, not at the court of appeals. Until a case reaches the Supreme Court, goes the view, agency briefs represent "unreviewed staff decisions," and Congress could not have meant to delegate "the power to make law to fill gaps in" the law to low-level staff. *Keys v. Barnhart*, 347 F.3d 990, 993–94 (7th Cir. 2003).

A deference doctrine that turns on whether a brief was filed in the United States Supreme Court or a court of appeals has little to commend it. An "inferior" appellate court, U.S. Const. art. III § 1, has just as many reasons, if not more, to learn the agency's interpretation of one of its regulations in the course of resolving a dispute between two private parties before it issues a decision rather than after. This case is a perfectly good example. The regulations are intricate and complex, and as a result we called for the views of the FCC in order to understand how the agency construed its regulations and to make sure we were not

missing something in the process. The Seventh Circuit may or may not be right that, when a court of appeals invites an agency to take a position in a given case, it can expect nothing more than "unreviewed staff decisions." As for myself, I doubt it, and if I am wrong that suggests a management problem, not a proper view of how agencies should operate. It seems likely that agencies take their *amicus* briefs—particularly those filed *at the request* of a court of appeals—at least as seriously as their more frequent opinion letters, which also receive *Auer* deference, *see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 563–64 (1980). As agencies must well appreciate, moreover, lower courts reap the same benefits as the Supreme Court from an agency's "fair and considered judgment," *Auer*, 419 U.S. at 462, including the advantage of the agency's "unique expertise and policymaking prerogatives," *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). In any event, the Supreme Court has strongly hinted that *Auer* deference does not turn on whether an agency's position was prepared by its staff or its head. *See Ford Motor Credit Co.*, 444 U.S. at 566 n.9. There is, in short, no reason why an agency brief—particularly one filed at the request of a court—becomes less authoritative because it is filed with a court based in Cincinnati, Ohio rather than one based in Washington, D.C.

Second, the majority suggests that the *TRRO* does not deserve *Auer* deference because it is an interpretive rule, not a legislative one. I disagree with the majority's characterization of the *TRRO* and its suggestion that interpretive rules do not deserve *Auer* deference. The FCC had a formal notice-and-comment

period before issuing the *TRRO*, and the *TRRO* concludes by adopting seven pages of amendments to the Code of Federal Regulations. *See TRRO* ¶¶ 18–19, 239–251, App'x A, App'x B. The *TRRO* in point of fact promulgates the version of 47 C.F.R. § 51.319(e)(2)(i) that the majority quotes. *See TRRO* at 2677, 2682; Maj. Op. at 9–10. All of this confirms that the *TRRO* is a legislative rule. *See Lincoln v. Vigil*, 508 U.S. 182, 195–196 (1993); *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 949 (6th Cir. 2000) ("[I]f by its action the agency intends to create new law . . . , the rule is properly considered to be a legislative rule.").

Perhaps the majority means that ¶¶ 136–40 of the *TRRO* do not deserve deference because those paragraphs are part of the "concise general statement" of the *TRRO*'s "basis and purpose," 5 U.S.C. § 553(c), not amendments to the federal code. *See* Maj. Op. at 7 n.6 ("[T]he *TRRO* . . . is . . . not a true 'regulation.'"). I am unaware of any court reading such a line into *Auer*. No one has done so, I believe, because "[c]ourts and Congress treat the terms 'regulation' and 'rule' as interchangeable," *Nat'l Treasury Employees Union v. Weise*, 100 F.3d 157, 160 (D.C. Cir. 1996), and "concise general statements" are part of the rule, *see* 5 U.S.C. § 553(c); *Lincoln*, 508 U.S. at 195–96. Justice Scalia's concurrence in *Couer Alaska* is not to the contary. *See Couer Alaska, Inc. v. Se. Alaska Conservation Council*, ___ U.S. ___, 129 S. Ct. 2458, 2479 (noting courts defer under *Auer* only "to an agency's interpretation of *its own ambiguous regulation*."). Justice Scalia was distinguishing between regulations and statutes, not between sections of a legislative rule. *See id.*

But whether the *TRRO* is an interpretive or legislative rule is beside the point. We generally defer to an agency's interpretation of its own rules because it "make[s] little sense" to impose our interpretation on the agency when it remains free to rewrite the rule (largely) however it wants. *Auer*, 519 U.S. at 463. That rationale applies with extra force to interpretive rules: An agency could amend its interpretive rule and wipe a court's interpretation off the board without even the delay of notice-and-comment rulemaking.

In the final analysis, the FCC's interpretation reasonably respects the words of its regulations and *Auer* requires us to respect that interpretation. The majority seeing it differently, I respectfully dissent.

Nos. 07-2469/2473

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN BELL TELEPHONE COMPANY,

Plaintiff-Appellee (07-2469/2473),

FILED
Jun 02, 2010
LEONARD GREEN, Clerk

v.

COVAD COMMUNICATIONS COMPANY, ET AL.,

Intervenors Defendants-Appellants (07-2469), Intervenors (07-2473),

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., ET AL.

Intervenors (07-2469),

J. PETER LARK, COMMISSIONER, ET AL.,
Defendants (07-2469),

LAURA CHAPPELLE, ET AL.,

Defendants-Appellants (07-2473).

BEFORE: BATCHELDER, Chief Judge; GILMAN and SUTTON, Circuit Judges.

The court having received two petitions for rehearing en banc, which were circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied. Judge Sutton would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT&T MICHIGAN,
Plaintiff,

v. Case number 06-11982
Hon. Julian Abele Cook, Jr.

J. PETER LARK, LAURA CHAPPELLE, AND MONICA MARTINEZ, in their official capacities as commissioners of the Michigan Public Service Commissions and not as individuals,

Defendants,

and

COVAD COMMUNICATIONS COMPANY, McLEODUSA TELECOMMUNICATIONS SERVICES, INC., TALK AMERICA, INC., TDS METROCOM, L.L.C., and XO COMMUNICATIONS SERVICES, INC.

Defendant-Intervenors.

ORDER

This case is an appeal by the Plaintiff, Michigan Bell Telephone Company, doing business as AT&T Michigan, from an "Opinion and Order" that had been issued by the Michigan Public Service Commission ("MPSC") on September 20, 2005. These issues, about

which the parties have differences of opinion, were addressed in their respective motions for summary judgment. For the reasons that have been set forth below, the Court will grant in part the parties' respective applications for relief.

I.

On April 28, 2006, AT&T Michigan filed this lawsuit, contending that the Defendants, in their official capacities as commissioners of the MPSC, had issued an "Opinion and Order" on September 20, 2005[1] which is legally preempted by the Telecommunications Act of 1996. On May of the same year, five entities (namely, Covad Communications Company, McLeod USA Telecommunications Services, Inc., Talk America, Inc., TDS Metrocom, L.L.C., and XO Communications Services, Inc.) filed motions to intervene in the litigation, all of which were granted by the Court. Several months later (January 26, 2007), AT&T Michigan filed a motion for a summary judgment, seeking to obtain the entry of an order that would (1) permanently preclude the MPSC from enforcing the unbundling and cost-based pricing requirements that had been mandated by the MPSC in its September Order; (2) require a "true-up" of the transitional rates that had been issued by this state public service utility commission; and (3) direct the MPSC to establish appropriate rates for routine network modifications. On the same date, Covad Communications Company et al (called "Defendant-Intervenors" hereinafter) filed a cross-motion for summary judgment, in which they

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[1] For purposes of simplicity, this MPSC "Opinion and Order" will be identified as the "September Order."

collectively asked the Court to uphold the validity of the now-challenged September Order.[2]

II.

Initially, the Court determines that there are no genuine issues of a material fact which must be explored prior to its examination of the legal issues that have been raised by the parties in their respective motions. Fed.R.Civ.P. 56. Hence, the Court will now turn to other relevant matters that the parties have submitted for review.

Section 252 of the Telecommunications Act of 1996, 47 U.S.C. Sec. 252(e)(6), contains the following language:

> In any case in which a State commission makes a determination under this section [252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section [252].

In 2002, the Sixth Circuit Court of Appeals reaffirmed the authority of the federal courts to conduct a *de novo* review of an order from a state public utility commission to determine if it is in compliance with the requirements of the 1996 Act without giving deference to the commissioners' interpretation of this statute. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 586

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[2] A brief in opposition to the AT&T Michigan motion was also filed by the MPSC.

(6th Cir 2002). Moreover, a decision by a state public utility commission can be sustained only on those grounds that have been set forth within its orders. As such, a "reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bangura v. Hanson*, 434 F.3d 487, 502 (6th Cir. 2006).

On the other hand, the Sixth Circuit has declared that "[a]s for the MPSC's findings of fact made in the course of exercising its enforcement authority, we join our sister circuits in applying the 'arbitrary and capricious' standard." *Strand*, 305 F.d3d at 586. This arbitrary and capricious standard is the least demanding form of judicial review of an administrative action. Thus, the *Strand* court advised the district courts that when it is possible to offer a reasoned explanation for a particular outcome on the basis of the existing evidence, it is neither arbitrary nor capricious. *Id.* at 587.

III.

Historically, local telephone service was provided by state-regulated monopolies, each with its own distinct service territory. The rates and duties of such companies were regulated by the public utility commissions in each state. In the early 1990s, Michigan and other states undertook steps to introduce competition into the local market. However, these efforts were largely unsuccessful and competition in local markets remained practically nonexistent for an extended period of time. For this reason and to avoid patchwork regulation among the states, Congress

passed the Telecommunications Act of 1996 ("1996 Act"), codified at 47 U.S.C. § 152 *et seq.*

The 1996 Act established a "pro-competitive, de-regulatory national policy framework" that was "designed to accelerate [the deployment of new technology and services and to] open . . . all telecommunications markets to competition." H.R. Conf. Rep. No. 104-4568, at 1. Indeed, the Sixth Circuit Court in *Michigan Bell Telephone Co. v. MCIMetro Access Transition Services, Inc.*, 323 F.3d 348, 352 (6th Cir. 2002), explained that:

> [The 1996 Act] has been called one of the most ambitious regulating programs operating under "cooperative federalism," and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets. We have often reiterated the Act's purposes, which are ending local telephone monopolies and promoting competition in local telephone markets.

The objective of the 1996 Act was to ensure that "local service, which was previously operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law." *MCI Telecom. Corp. v. Bell Atl-Pa.*, 271 F.3d 491, 497 (3rd Cir. 2001). This legislative enactment preempted all previously existing state laws that had restricted local competition, including the exclusive franchises which had been granted to incumbent local telephone service carriers by the

various state public utility commissions.[3] However, Congress, in recognizing the existence of the practical hurdles to competition posed by requiring competitors to build duplicative stand-alone networks, concluded that the elimination of the historical legal barriers to competition was not enough to guarantee its development in the local markets. Thus, the 1996 Act represented a congressional effort to address this problem by requiring incumbent local telephone service carriers to open their networks to competing local carriers.[4]

To this end, the 1996 Act imposed several duties upon every incumbent carrier. As an example, each incumbent carrier was directed to negotiate or arbitrate agreements with competing local carriers by offering one of three methods of competition; namely, (1) provide an interconnection to its network to a competing carrier that builds or has it own networks, 47 U.S.C. § 251(c)(2); (2) enable a competing carrier that desires to lease all or a part of the incumbent's network – as opposed to building its own – with access to its network elements on an "unbundled basis," 47 U.S.C. § 251(c)(3); or (3) sell its services at wholesale prices to a competing carrier that will resell them at retail prices, 47 U.S.C. § 251(c)(4).

This legislation also directed the Federal Communications Commission ("FCC") to create

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[3] The phrase, "incumbent local exchange carrier," refers to those telephone companies, such as AT&T Michigan, that had held monopolies in local markets prior to the passage of the 1996 Act.

[4] The phrase, "competing local carrier,"is the identification of a new entrant into the deregulated market. Here, the Defendant-Intervenors satisfy this definition for the purpose of this litigation.

implementing regulations, while giving oversight responsibilities of the "interconnection agreements" to state public utility commissions. More importantly, the 1996 Act gave the task of determining which network elements must be shared or unbundled by incumbent carriers to the FCC. The language within 47 U.S.C. § 251(d)(2) provides that when determining "what network elements should be made available" for unbundling, the FCC "shall consider, at a minimum, whether - (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of " the competing carrier to offer its services. 47 U.S.C. § 251(d)(2).

The unbundling requirement, as well as the FCC's interpretation of the elements that incumbent carriers must share with every competing local carrier, has evolved and been the subject of continuing litigation over the years. In 1996, the FCC issued its *First Report and Order*,[5] which was immediately challenged by incumbent carriers. In 1999, the Supreme Court determined that some of the provisions within this *First Report and Order* were unlawful, and instructed the FCC to revise its regulations. *AT&T Michigan Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). As directed, new regulations were issued by the FCC in November 1999 in its *UNE Remand Order.*[6] However, the D.C. Circuit Court of Appeals rendered a decision on May 24, 2002 which held that some of these revised regulations were unlawful. *United States*

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[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCCR 15499 (1996).

[6] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCCR 3696 (1999).

Telecom Ass'n v. FCC, 290 F.3d 415 (2002).[7] Thereafter, the FCC responded by issuing its *Triennial Review Order* ("TRO") on August 21, 2003, which contained a new set of regulations.[8] An appeal followed. The D.C. Circuit Court of Appeals vacated several portions of the *TRO* regulations in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (2004).[9] In February 2005, the FCC issued a new set of unbundling rules in the *Triennial Review Remand Order* ("TRRO")[10] which were subsequently affirmed on appeal. *Covad Comms. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

The Congress, in its passage of the 1996 Act, also assigned specific responsibilities to the state public utility commissions. Section 252 of this statute establishes the procedural framework by which competing carriers may enter into contracts, called "interconnection agreements," with incumbents to fulfill the obligations that are found in subsections 251(b) and 251(c), including the duty to provide unbundled access to certain network elements, as required by 251(c)(3). The 1996 Act also (1) requires incumbent carriers to negotiate these agreements upon request, and (2) provides for the assignment of a regulatory review of interconnection agreements to state public utility commissions. However, if these negotiations do not produce an agreement, either party to the process may petition the state public utility

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[7] This case is identified as "*USTA I*."

[8] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCCR 19020 (2003).

[9] This case is identified as "*USTA II*."

[10] *Order on Remand, In re Unbundled Access to Network Elements*, 20 F.C.C. R. 2533 (2005).

commission to arbitrate the unresolved issues. 47 U.S.C. § 252(b)(1). If either or both parties disagree with the terms within the interconnection agreement, as arbitrated by the state public utility commission, a review by a federal district court is available to the aggrieved party. 47 U.S.C. § 252(e)(6).

In addition, the 1996 Act has a special provision for those regional "Bell operating companies," that split off from AT&T as the result of a 1982 antitrust settlement. Prior to the passage of the 1996 Act, these companies had been precluded from providing long distance telephone service to their customers. However, Congress, in its enactment of the 1996 Act, provided these Bell operating companies with an opportunity to enter the long distance market in a state within its service area if certain steps were undertaken to open its local service market to competition. *Sprint Communications Co. L.P. v. F.C.C.*, 274 F.d3d 549, 551 (D.C. Cir. 2001).

Section 271 of the Act specifically deals with the ability of the Bell operating companies to provide long distance services. 47 U.S.C. § 271(d). In order to gain permission to offer long distance services in a state in which a Bell operating company provides local service, the 1996 Act requires it to apply for approval with the FCC. 47 U.S.C. § 271(b)(1). Thereafter, the FCC has a period of ninety days from the date of the application in which to grant or deny the request for approval, based on whether the Bell operating company has satisfied the statutory prerequisites. In order to receive approval from the FCC, a petitioning Bell operating company must meet the fourteen identifiable

requirements of a "competitive checklist" in Section 271(c)(2)(B).

IV

In February 2005, AT&T Michigan notified competing carriers of its intention to modify some of the existing interconnection agreements which, arguably, were no longer in compliance with the FCC regulations. However, some of the competing carriers, including the Defendant-Intervenors, proffered their objections to this proposal with the MPSC, contending that AT&T Michigan should not be allowed to unilaterally modify the interconnection agreements. Thereafter, the MPSC initiated a proceeding (case no. U-14447), in which it initially directed the parties to engage in a collaborative process as a means of resolving their disagreements. Two of the Defendant-Intervenors (i.e., Talk America, Inc., and XO Communications Services, Inc.), added an additional issue to the collaborative process, contending that the interconnection agreements had not adequately implemented some of the rulings by the FCC in the *TRO* that had not been adversely affected by *USTA II* or the *TRRO*. As a result, the MPSC expanded the collaborative process to include those issues that had been raised by these two competing carriers.

On September 20, 2005, the MPSC rendered the "September Order" which included its decisions relating to twenty-nine of the issues that had been raised by the parties, five of which have been challenged by AT&T Michigan and are the subject of this appeal.

V

There is a disagreement between the Plaintiff and the Defendant-Intervenors over whether AT&T Michigan's obligations under 47 U.S.C. § 271 should be included in their interconnection agreements and, if so, to what extent. In its September Order, the MPSC declined to adopt the suggested language by either party regarding their respective obligations under Section 271. However, the MPSC, in reasserting its authority to issue the now-challenged directive, ordered the parties to negotiate, stating:

> The Commission is still convinced that obligations under Section 271 should be included in the interconnection agreements approved pursuant to Section 252. However, the Joint CLEC's[11] must negotiate with SBC[12] concerning terms and conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action.

September Order at 16.

AT&T Michigan challenges the efficacy of this ruling, maintaining that the MPSC did not have the authority to issue such a directive. The Defendant-Intervenors argue that this challenge by AT&T Michigan is not ripe for a decision and should be

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[11] Competing carriers are often referred to as CLECs in the telecommunications industry.

[12] AT&T Michigan Michigan had previously conducted its business operations as "SBC."

dismissed. They point out that the September Order only outlined an appropriate method upon which to resolve any potential Section 271 disputes, claiming that AT&T Michigan had not presented the Court with a justiciable case or controversy.

Contrary to this argument by the Defendant-Intervenors, the September Order does impose a binding duty upon AT&T Michigan that it negotiate and include Section 271 obligations in its Section 252 agreements. Hence, the Court finds that this issue presents a justiciable case or controversy, and that a resolution of this matter by the Court is proper and necessary.

Next, AT&T Michigan argues that the directive in the September Order, which includes Section 271 obligations in its interconnection agreements, is without any justifiable legal basis. AT&T Michigan initially points to the structure of the 1996 Act that established two separate regulatory frameworks in which to govern two distinct markets. In one framework, it established competition for local telephone service. In the other framework, it discussed the entry by the Bell operating companies into long-distance markets. Section 251 is the linchpin of the framework on local telephone service. 47 U.S.C. § 251-261. Whereas, Section 271 appears in the framework of the 1996 Act which relates to Bell operating companies. 47 U.S.C. § 271-276.

Congress gave decision-making authority to the various state public utility commissions, such as the MPSC, in only one of these frameworks; namely, governance over those matters that pertained to

competition in local telephone markets. In sharp contrast to the shared federal and state authority for local telephone markets, Congress established a separate framework for those Bell operating companies that are administered solely by the FCC. Approval for the Bell operating companies to provide long distance service under Section 271 is expressly granted by the FCC – not the state utility commission. If an aggrieved party believes that a Bell operating company – like AT&T Michigan – does not satisfy the requirements of Section 271, a complaint may be filed with the FCC. 47 U.S.C. § 271(d)(6).

The MPSC and the Defendant-Intervenors have a different view of this issue. They point to Section 271(c)(2)(A)(ii), which requires a Bell operating company – as a condition precedent to providing long distance services to its customers – to satisfy the requirements of Sections 251 and 252. By directly referencing these paragraphs within Section 271, the 1996 Act incorporates the obligation of a Bell operating company to comply with the requirements of Section 252. It is also undisputed that approval from the FCC for a Bell operating company to enter a long-distance market under Section 271 initially depends on a review and approval by the state public utility commission. This state approval process acts as a further binder of these two sections. The Defendant- Intervenors also argue that a broadly implied authority exists under Section 252 for the state public utility commissions to undertake the necessary action to effectuate the Act, including Section 271.

Unfortunately, there is no direct case law on this issue within this Circuit. However, AT&T Michigan

cites to *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004), in which the Seventh Circuit Court of Appeals opined that a state public utility commission may not "parlay its limited role in issuing a recommendation under section 271, involving longdistance service, into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service."

Following its review of the record, the Court concludes that the MPSC does not have the authority to direct the parties to negotiate those terms and conditions which pertain to Section 271 in the interconnection agreement process. Section 271 grants oversight authority to the FCC, but not to the state public utility commissions. Thus, the Court declares the directive by the MPSC, as found in the September Order relating to this matter, to have been unlawfully issued and must be set aside.

VI

In the dispute resolution process that preceded the issuance of the September Order, the parties debated the issue as to whether AT&T Michigan, as an incumbent carrier, must continue to provide entrance facilities to competing carriers at TELRIC rates.[13] The MPSC, in its September Order, determined that AT&T Michigan was obligated to provide "entrance facilities

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[13] Unbundled network elements (UNEs) must be provided at cost-based rates, 47 U.S.C. 252(d)(1), and the FCC has defined the methodology to set such prices. This methodology is commonly known within the industry as "TELRIC," which stands for Total Element Long-run Incremental Cost. This technical term translates to "cost-based rates," as opposed to "retail rates."

to the extent required for interconnection pursuant to Section 251(c) of the 1996 Act." September Order at 13.[14]

As a network element, entrance facilities are subject to an "impairment" analysis under Section 251(d)(2) of the Act to determine whether they must be unbundled (i.e., leased to requesting carriers at TELRIC -based rates) under Section 251(c)(3). *USTA II*, 359 F.3d at 586. In the *TRRO*, the FCC conducted an impairment analysis and concluded that entrance facilities can be procured by competing carriers at a low cost with no impairment to competing carriers. *TRRO* ¶ 138. The FCC declared that competing carriers can readily obtain these facilities from other sources or economically provide them for themselves. The FCC also rendered the following declaration in ¶ 140, which is the source of the dispute between the parties in this case, as well as the authority upon which the MPSC relied on in making its finding regarding entrance facilities:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to

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[14] The term "entrance facilities" was defined by the D.C. Circuit Court of Appeals as "dedicated transmission facilities that connect ILEC and CLEC locations." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 585 (2004). In a layman's term, entrance facilities can be defined as the mechanism that is used to transport traffic between networks. Under the 1996 Act, entrance facilities are defined as a "network element" to which incumbent carriers must provide competing carriers with unbundled access pursuant to 47 U.S.C. § 251(c)(3). *TRRO* at ¶¶ 136-137.

> section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LEC's will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO, at ¶ 140. In the next paragraph, the FCC opined that "[t]he evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities." *TRRO* at ¶ 141.

The Defendant-Intervenors and the MPSC have taken the position that ¶ 140 represents an acknowledgment by the FCC that entrance facilities can be used by CLECs for different purposes. They maintain that entrance facilities can be used in two ways; namely, (1) to provide a final link in the transmission path between a competing carrier's customer and the carrier's switch, and (2) to serve as interconnection facilities with which to exchange traffic between incumbent and competing carriers' switches. The Defendant-Intervenors claim that the first situation (known in the industry as "backhauling,") is where a competing carrier uses an incumbent's entrance facilities to carry traffic to and from its own end users. However, they acknowledge that a competing carrier in this situation is not entitled to use the entrance facilities at TELRIC-rates. On the other hand, the Defendant-Intervenors submit that, in dealing with the second situation, a competing carrier, which uses entrance facilities to interconnect with the incumbents network, is entitled to cost-based rates.

In a counter argument, AT&T Michigan asserts that the MPSC's interpretation of ¶ 140 of the *TRRO*, if adopted, would have the practical effect of nullifying the earlier findings by the FCC. AT&T Michigan maintains that competing carriers have the right to obtain interconnection facilities pursuant to § 251(c)(2), without any corresponding right to lease such facilities at TELRIC rates.

The Court agrees with AT&T Michigan and concludes that the September Order which pertains to this issue does not comply with the rules that were adopted by the FCC pursuant to Section 251. It is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule. The meaning of ¶ 140 must be interpreted in light of the FCC rule, which provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis. The *TRRO* conveys the finding by the FCC that entrance facilities should be offered competitively. A review of the ruling by the MPSC reveals that the September Order does not comply with this directive, and, accordingly, must be set aside.

VII

AT&T Michigan also challenges the holding by the MPSC in its September Order as it relates to how to define the term "business lines." In its directive, the MPSC rejected AT&T Michigan's position on the definition of business lines serving a wire, and instead incorporated the following language that had been

proposed by the competing carriers into its September Order:

> The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P, UNE-L, or leased line will be counted when it serves a business customer. Therefore, the Commission concludes that the language proposed by the Joint CLECs should be adopted for purposes of the amendment to the interconnection agreements.

September Order at 9.

As explained above, the 1996 Act requires incumbent carriers to share, or unbundle, certain network elements with competing carriers. Section 251(d)(2) states that in determining which network element must be unbundled, the FCC must find that the network element satisfies the "necessary and impair" standard; i.e., that the element must be necessary for a competing carrier, and the competing carrier must be impaired without access to the incumbent's element at issue. Loops and transport circuits are network elements. In the *TRO* and the *TRRO*, the FCC grappled with trying to determine whether and where competing carriers were impaired if they could not obtain loops and transport circuits from incumbent carriers.

An impairment does not exist in those locations in which the economics of the market justify the construction of competitive facilities or where network elements can be obtained from providers other than incumbent carriers. In the *TRRO*, the FCC determined that, in those circumstances involving high-capacity loops and transport wherein it could not cite to conclusive evidence of non-impairment in particular markets or on particular transport routes between wire centers, the presence of multiple fiber-based collocators and a high concentration of business lines in incumbent wire centers provided a reasonable "proxy" for identifying those situations in which an impairment did not exist. *TRRO* at ¶¶78 - 103. Specifically, the FCC stated:

> We have weighed carefully a variety of actual competitive indicia for determining impairment and determine that the best and most readily administered indicator of the potential for competitive deployment is the presence of fiber-based collocators in a wire center. We also determine that business line density in a wire center is a useful tool to infer where carriers are likely to have collocated with fiber, and thus, a measure of where competitors are capable of duplicating the incumbent LEC's network. Both of these measures constitute proxies for where sufficient revenue opportunities exist to justify the high fixed and sunk costs of transport deployment.

TRRO at § 93.

In accordance with these findings, the FCC established specific numerical thresholds for the number of "business lines" and/or fiber-based collocators in a wire center. Once a wire center exceeds these thresholds, the incumbent is no longer required to unbundle high-capacity loops to transport wire from that center. For example, once a wire center is served by at least 60,000 business lines and at least four fiber-based collocators, no future DS1 loop[15] unbundling will be required in that wire center. For DS3 loops[16], the threshold is met by a wire center with at least 38,0000 business lines and at least four fiber based collocators. 47 C.F.R. § 51.319(a)(5)(I).

Thus, the issue between AT&T Michigan and the Defendant Intervenors is which lines are counted as business lines. The FCC's regulations defined business line in the following manner:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line form the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center,

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[15] A DS1 loop is a type of loop that carries that equivalent of 24 voice-grade telephone lines.

[16] A DS3 loop carries the equivalent of 672 individual voice grade telephone lines.

> including UNE loops provisioned in combination with other unbundled elements.

47 C.F.R. § 51.5.[17]

AT&T Michigan submits that the MPSC, when declaring in its September Order that "to be counted as a business line, the line must serve a business customer," rendered an interpretation which, in its judgment, was unlawful. Further, it maintains that the number of business lines counted should include all UNE loops, and claims that the MPSC's interpretation only counts "some" UNE loops.

In support of its argument on this issue, AT&T Michigan looks first to the regulatory language which it believes to be clear and unambiguous, noting that it uses the phrase, "all UNE loops." 47 C.F.R. § 51.5. Moreover, the directive to count "all UNE loops" is consistent with the FCC's underlying goal that impairment criteria be simple and easy to administer. Pursuing this issue, AT&T Michigan argues that while counting all loops is a relatively simple task, as this data has already been tracked, a compilation of pertinent data on loops connected to businesses is more complicated. Many states, including Michigan, do not have the ability to determine whether a stand-alone loop is being used to serve a business customer or a residential customer. AT&T Michigan points out that a loop belongs to an incumbent carrier, whereas the customer belongs to its competitor who possesses the

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[17] "UNE" stands for "unbundled network element," and refers to those elements which must be unbundled, or shared, with competing carriers.

knowledge about the use of the loop – not the incumbent.

The Defendant Intervenors defend the MPSC interpretation which, it believes, is correct and reflects the FCC's intention to limit the number of business lines as a proxy for determining where revenue opportunities exist. They also point to ¶ 103 of the *TRRO*, which explains the FCC's decision to focus on business line density, stating:

> Business line density . . . is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities, despite the fixed and sunk costs of deployment. . . . Further, business lines are a more accurate predictor than total lines because transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated.

TRRO, ¶ 103.

The Court disagrees with the Defendant Intervenors, and concludes that the September Order improperly confuses the definition of a business line with the procedure that is used for counting it as specified in the governing regulation, 47 C.F.R. 51.5. Unfortunately, the September Order ignores the plain language of the regulation, and transforms an otherwise unambiguous phrase, "all UNE loops," to

mean only some UNE loops. Moreover, the Court concludes that the MPSC, in misconstruing the regulation, has violated existing federal law. Accordingly, this part of the September Order must be voided.

VIII

Prior to the *TRRO*, which was issued in February 2005, local switching was often provided to competing carriers in a combination of unbundled network elements (or "UNEs") known as the "UNE Platform," or "UNE-P." The UNE Platform provided a competing carrier with unbundled access to a package of network elements that are composed of switching, a local loop, and a shared transport of calls between wire centers.[18] The entire platform was provided to competing carriers at cost-based, or TELRIC, rates.

In the *TRRO*, the FCC determined that there was no longer any need for local switching to be unbundled by incumbent carriers to competing carriers. To put it simply, after the holding in the *TRRO*, local switching was no longer a UNE (unbundled network element). As a result, competing carriers are not entitled to use the local switching of the incumbent carriers at cost-based rates, and the original method of providing a group of network

[18] It is understood within the telecommunications industry that a local exchange network is comprised of three elements: (1) local loops, which are the wires connecting telephones to switches, (2) switches, which are the equipment that directs calls to their to their destinations, and (3) transport trunks, which are the wires carrying calls between switches. *AT&T Michigan Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999).

elements through the UNE Platform has been eliminated.

In the *TRRO*, the FCC also determined that rather than require competing carriers to immediately switch from paying cost-based rates to retail rates for local switching, it would allow the participants a period of transition in which to adjust. The purpose of the transition was to provide for an "adequate time for both competing LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loops cut overs or other conversions." *TRRO* at ¶ 227. To put it simply, the transition was designed to ensure an orderly migration of the UNE Platform and unbundled switching. To that end, the FCC required incumbents to continue to "provide access to local circuit switching on an unbundled basis" to a carrier's "embedded base" of end-user customers for a 12-month period. 47 C.F.R. Section 51.319(d)(2)(iii). It adopted a new rate applicable during the 12 month transition period of the existing UNE Platform rate plus a dollar. The *TRRO* stated that this would:

> help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated . . . while at the same time, these price increase, and the limited duration of the transition, provide some protection of the interests of the incumbent LECs in those

> situations where unbundling is not required.

TRRO at ¶ 228.

In the negotiation and arbitration that led up to the September Order, the parties raised the issue of the appropriate rate for competing carrier customers who migrated to a functionally equivalent AT&T Michigan service arrangement (e.g., resale) before the transition period ended on March 11, 2006. The September Order adopted the language provided by the Defendant Intervenors, and held that, unless the competing carrier requests or agrees otherwise, the FCCestablished transition rate (i.e., the UNE Platform rate plus one dollar) would apply.

In order to phase out the UNE Platform, competing carriers were given a period of one year to transition their customers to a different commercial arrangement. AT&T Michigan contends that once the customer is switched to a new carrier, the transition rate should no longer apply, and a retail rate should apply in its place. AT&T Michigan argues that requiring it to provide local switching at the transition rate after the customer has been "resold" to another carrier constitutes an unlawful unbundling, in violation of the *TRRO*.

The Court disagrees with this argument by AT&T Michigan. On this issue, the September Order provision which calls for a designated transition period is clearly within the framework of ¶228 of the *TRRO*, which specifically gives state public utility commissions the discretion to implement these rates.

The method within the September Order for dealing with the transition period is reasonable. Thus, the Court finds that it is in accordance with federal law.

IX

FCC regulations require incumbent carriers "to make routine network modifications to unbundled transmission facilities such by requesting carriers where the requested transmission facilty has already been constructed." *TRO* at ¶632; 47 C.F.R. Section 51.319(e)(4). For example, an incumbents' loops are not capable of functioning as digital high-capacity loops until the incumbent has modified them by removing certain equipment or adding other equipment. *TRO* at ¶¶633, 634. The same can be true of an incumbent's transport circuits. These technical modifications are commonly referred to in the industry as "routine network modifications."[19]

Federal law requires that incumbents be compensated for the costs of making modifications. In the TRO, the FCC stated:

> The Commission's pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here. State commissions have discretion as to whether these costs should be recovered

[19] The FCC gave the following examples of necessary loop modifications required "rearrangement or splicing of cable, adding a double or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer." *TRRO* at § 634.

> through non-recurring charges or recurring charges. We note that the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modifications may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors (ACFs)). The Commission's rules make clear that there may not be any double recovery of these costs (*i.e.*, if costs are recovered through recurring charges, the incumbent LEC may not also recover these costs through a NRC).

In the September Order, the MPSC rejected the suggested language by AT&T Michigan regarding the recovery of costs for network modifications, and instead, adopted language that had been proposed by the competing carriers. The MPSC stated that costs "for which [AT&T Michigan] seeks to impose additional charges should be recovered through the charges approved in Case No. U-13531." AT&T Michigan claims that this directive is arbitrary, capricious and violates the cost-recovery mandates of the 1996 Act, in that (1) the September 2004 order in U-13531 (which established new TELRIC rates for UNEs) was issued five months before the *TRRO*, and (2) the MPSC precluded it from seeking an update from September 2004 until September 2006. Therefore, AT&T Michigan

concludes, the MPSC's order violates the cost-recovery mandates of the Act, the FFC's implementing orders, and is arbitrary and capricious. The Defendant Intervenors respond by pointing out that the MPSC gave AT&T Michigan a full opportunity to present its costs and to seek rates that would recover its costs while performing routine network modifications. Finally, they conclude that the decision by the MPSC is neither unlawful nor arbitrary and capricious.

On this issue, the Court finds that the September Order is within the discretion of the MPSC. More importantly, the Court determines that this provision neither violates the 1996 Act nor federal regulations. Hence, the arguments on this issue by AT&T Michigan are rejected.

VIII

Accordingly, and for the reasons stated above, the Court will grant a summary judgment in favor of AT&T Michigan on the following issues: (1) The September Order ruling that obligations under Section 271 should be included in interconnection agreements under Section 252 is unlawful; (2) the declaration within the September Order ruling, which requires the unbundling of entrance facilities, is invalid; and (3) the definition of business lines in the September Order contravenes federal law. The Court will also grant a summary judgment in favor of the MPSC and the Defendant Intervenors on the following issues: (1) the authority in the September Order which provides for the recovery of transition period rates is within the discretion of the MPSC, and (2) the contested language in the September Order which pertains to AT&T

Michigan's recovery of routine network modification costs is lawful.

Dated: September 26, 2007 s/ Julian Abele Cook, Jr.

Detroit, Michigan JULIAN ABELE COOK, JR.

United States District Court
Judge

Certificate of Service

I hereby certify that on September 26, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system, and I further certify that I mailed a copy to the non-ECF participant(s).

s/ Kay Alford

Courtroom Deputy Clerk

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by **SBC MICHIGAN** and **VERIZON**.	)))))))	Case No. U-14447

At the September 20, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER

On May 17, 2005, the Commission issued an order in this case modifying the process to be used to bring current interconnection agreements into compliance with the Federal Communications Commission's (FCC's) Triennial Review Order[1] (*TRO*)

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[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98,

and its Triennial Review Remand Order (*TRRO*). In place of the original process, the parties proposed the following:

> 1. By May 31, 2005, the parties will file a joint disputed issues list, which will reflect the issues the parties need to resolve. The parties will attempt to phrase each issue in an informative and neutral manner.
>
> 2. The disputed issues list will refer to contract language proposed by each party. The contract language should be written so that regardless of the combination of choices made for resolution of the disputes, the contract in its entirety is consistent. In other words, if option B is chosen on issue 1 and option A is chosen on issue 3, the related amendment language is not inconsistent. If such a result would occur, both issues 1 and 3 should be presented as one issue and the related

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98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984 (2003), vacated in part, *United States Telecom Assn v FCC*, 359 F3d 554 (DC Cir 2004).

[2] In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel'd August 20, 2004).

amendment language changed. The parties will file a baseline document differentiating language that has been agreed-upon, disputed language SBC Michigan (SBC) proposes, and disputed language one or more of the competitive local exchange carriers (CLECs) want. If the accompanying baseline language related to this issue can be conveniently inserted into the disputed issues list, it should be so inserted. If on any particular issue the accompanying baseline language cannot easily be inserted in the disputed issues list, the list will reference the baseline language at issue.

3. By June 14, 2005, each party may file in this docket all affidavits, exhibits, briefs, or other material or information upon which that party relies to support its position on each issue on the disputed issue list. Parties are not required to file support of every issue. If no party files in support of any particular issue, that issue will be decided in favor of SBC. Similarly, if SBC does not file in support of any particular issue, then the issue will be decided in favor of the CLECs.

4. By June 24, 2005, each party may file a response to the June 14, 2005 submissions.

5. The Commission will rule on the disputed issues without need for further submissions or hearing, unless the Commission determines otherwise. The Commission will also set a schedule for filing the amendments that conform to the Commission's ruling for approval. All parties reserve their rights to appeal any Commission ruling.

In the May 17 order, the Commission adopted the process proposed by the parties, while urging them to continue to narrow issues and negotiate resolutions to as many issues as possible before submitting the disputed issues list to the Commission.

On June 3, 2005, the Commission Staff (Staff) filed, on behalf of the active participants in the collaborative, a joint list of 29 disputed issues. Along with that disputed issues list, the Staff submitted a double-redlined version of the contract language at issue, marked according to whether the disputed language was proposed by a competitive local exchange carrier (CLEC) or SBC Michigan (SBC).

On June 14, 2005, SBC and the Joint CLECs[3] submitted briefs and testimony and other evidence in support of their respective positions concerning the appropriate resolution of the issues placed before the Commission. On June 24, 2005, the parties submitted reply briefs.

On June 14, 2005, Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon) filed its submission concerning the joint disputed issues list. On June 24, 2005, responses to Verizon's submission were filed by TC3 Telecom, Inc. (TC3), TelNet Worldwide, Inc. (TelNet), and XO Communications Services, Inc. (XO). Thereafter, on June 30, 2005, Verizon filed a motion to strike those responses to its submission. By July 18, 2005, TelNet, TC3, and XO had filed responses to Verizon's motion.

On July 7, 2005, the parties filed notice that they had resolved Issue 15. On August 5, 2005, the parties filed a joint notice that they had resolved Issues 25 and 26 and part of Issue 23.

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[3] The parties referred to as the Joint CLECs include the following companies: American Farm Bureau, Inc., AT&T Communications of Michigan, Inc. (AT&T), CMC Telecom, Inc., Climax Telephone Company, GRID 4 Communications, Inc., Easton Telecom Services, L.L.C., LDMI Telecommunications, Inc., MCImetro Access Transmission Services LLC, McLeodUSA Telecommunications Services, Inc., Neutral Tandem – Michigan, LLC, NOW Communications, Inc., PNG Telecommunications Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Talk America Inc., TCG Detroit, TelNet Worldwide, Inc., Trinsic Communications, Inc., XO Communications Services, Inc., and Zenk Group, Ltd., d/b/a Planet Access.

SBC/CLEC Issues

Issue 1. Definition of Buildings

SBC explains that in the *TRRO* the FCC has restricted the ability of CLECs to purchase unbundled DS1 and DS3 loops to a maximum of ten DS1 loops and one DS3 loop for any single building. *Id.* ¶¶ 177 and 181, 47 CFR 51.319(a)(4)(ii) and (a)(5)(ii). SBC proposed language for Section 0.1.1 of the amendment which would define a building as a "structure under one roof." With respect to campus environments, SBC proposes that the definition provide that an educational, industrial, governmental, or medical premises or campus shall constitute a single building for purposes of the DS1 and DS3 limitation. SBC states that in such campus environments, SBC is not permitted to provision loops to each separate structure. Rather, SBC must deliver all loops to a single structure, and the campus owner or administrator connects the loop to facilities serving additional structures. Thus, SBC argues, logic dictates that the loop volume caps must be based on the volume of loops provisioned to that structure.

In contrast, SBC argues, the Joint CLECs' proposed definition of a building would be virtually impossible to administer and would effectively eviscerate the FCC's limitations on the unbundling of DS1 and DS3 loops. SBC complains that it would have to perform a title search to determine whether a building is a building for purposes of these limitations. It argues that the effect of the Joint CLECs' definition would be to permit a CLEC to obtain scores of unbundled DS3 loops in a single building that happens

to have a large number of suites – a result, it argues, that the *TRRO* does not permit.

The Joint CLECs argue that many CLECs focus their marketing efforts on the needs of small and medium sized businesses, generally using DS1 loops, which are rarely economical to construct. The Joint CLECs assert that their definition of a building should be adopted because it properly balances the complexities arising when dealing with multi-tenant property. They argue that SBC's definition would make the entire Michigan State University campus one single building, which, they argue, ignores any plain meaning of the FCC's chosen term "single building."

Moreover, the Joint CLECs argue, SBC's overly expansive definition appears to be designed to restrict to the greatest extent possible the ability of CLECs to serve certain customers. On the other hand, they argue, the Joint CLECs' proposed definition applies a common sense and reasonable interpretation to the term "single building," which is consistent with the FCC's underlying analysis of what may not be economic to serve without the availability of unbundled loops.

The Commission finds that the SBC-proposed definition of a building is the closest of the two to the commonly understood meaning of "single building," with one exception. The Commission finds that the portion of the definition that would require considering an entire campus or set of government or medical buildings to be a single building for purposes of the caps on the availability of DS1 and DS3 facilities should be deleted. The Commission is not persuaded

that the fix proposed by the Joint CLECs actually takes care of the problem. Therefore, the Commission concludes that the entire last two sentences of Section 0.1.1 should be deleted.

Issue 2. Fiber to the Home (FTTH), Fiber to the Curb (FTTC), and Hybrid Loops

a. Obligations to other than Mass Market Customers

SBC contends that the Joint CLECs' proposals on this issue are an attempt to revive unbundling requirements for large business customers eliminated by the FCC, and should be rejected. SBC argues that the FCC eliminated most unbundling requirements for FTTH and FTTC, citing 47 CFR 51.319(a)(2) and (3). SBC points out that there is no language in the FCC's rules that supports reading in a limit to the definition of FTTH or FTTC as to those loops that serve the mass market customers, defined as those customers served by less than four DS0s. SBC argues that in the *TRO*, the FCC eliminated any requirement to unbundle enterprise market loops, while generally maintaining unbundling requirements for mass market loops, except FTTH. It argues that in the *TRO*, the FCC has now extended the same unbundling framework applicable to FTTH loops to FTTC loops. 47 CFR 51.319(a)(3). SBC argues that its proposed language for defining FTTH loops in Section 0.1.4 virtually quotes verbatim the FCC's definition in the related rule.

The Joint CLECs argue that the FCC's unbundling relief for FTTH, FTTC, and hybrid loops, as delineated in the *TRO*, is limited to those loops

serving the mass market. They state that the FCC has repeatedly affirmed this position in its orders and cites supporting statements of then Chairman Powell. Although admitting that SBC's position on the issue is supported by an "unexplained ambiguity in the FCC's adopted rules," they argue that the FCC's orders and their stated purpose demonstrate that the Joint CLECs' position should be adopted.

The Joint CLECs argue that the only discussion in the *TRO* with respect to limiting the unbundling obligations of incumbent local exchange carriers (ILECs) for FTTH, FTTC, and hybrid loops occurs in the mass market loop section of the order. The Joint CLECs state that the FCC's explicit intent in limiting the requirement to provide these elements was to encourage the construction of facilities by CLECs to provide broadband to the mass market. Thus, the Joint CLECs argue, the FCC never intended these limits to apply to the enterprise market, and the Commission should approve the Joint CLECs' proposed language.

The Commission finds that the Joint CLECs' proposal to include a limitation for the definition of FTTH, FTTC, and hybrid loops should be rejected. First, the Commission notes that there is no language within the FCC rule defining these loops that would so limit the definitions. Further, the Commission notes that in the *TRO*, the FCC stated that although it was adopting rules specific to each loop type, its determination concerning unbundling obligations and limitations for such loops do not vary based on the customer to be served. *TRO*, ¶ 210. Therefore, the Commission is persuaded that the FCC did not create an ambiguity in its rules by not including the "mass

market customer" limitation proposed by the Joint CLECs. The language as proposed by SBC should be adopted with respect to this sub-issue.

b. Mass Market Definition

The Joint CLECs state that the FCC did not precisely define the line between a mass market customer and an enterprise customer. The Joint CLECs propose that the line should be drawn to include all residential customers and those business locations served by telecommunications capacity of less than four DS0s. It states that SBC would extend the definition to include all business locations served with a capacity of less than 24 DS0s. The Joint CLECs argue that their proposal is more consistent with the FCC's orders and has even been argued by SBC in other contexts as an appropriate set point for determining a mass market customer versus an enterprise customer.

SBC did not present argument on this sub-issue.

The Commission finds that the language proposed by the Joint CLECs should be adopted for Section 0.1.6, although given the finding above, it is unclear what the definition will accomplish for the Joint CLECs.

c. Predominantly Residential Definition

The parties disagree on the appropriate definition of predominantly residential as that term is used to denote a multi-dwelling unit, which is served consistently with rules for residential service. SBC

would prefer that no definition be established for predominantly residential, because the FCC did not adopt one, stating that a determination would be obvious on the facts of the nature of a particular building. As an alternative, SBC proposes that the section should define a predominantly residential building as one that allocates more than 50% of its rentable square footage to residential use. The Joint CLECs desire to define residential building as one using 75% or more of the rentable space allocated to residential use.

The Commission finds that to be predominantly residential, a multiple dwelling unit should have greater than 50% of its rentable space allocated to residential use. Therefore, the Commission adopts SBC's proposal for this sub-issue.

d. The parties have agreed to remove Section 8.1.5 to resolve this dispute.

Issue 3. Definition of Business Lines

The issue presented by the parties is whether standalone unbundled network element (UNE) loops used to serve residential customers should be counted as business lines for purposes of the wire center non-impairment determinations for high capacity loops and transport. SBC argues that in the *TRRO*, the FCC determined that CLECs are not impaired without access to DS3 high capacity loops in wire centers with at least 38,000 business lines and 4 or more unaffiliated fiberbased collocators, and that CLECs are not impaired without access to DS1 loops in wire centers with at least 60,000 business lines and 4 or

more unaffiliated fiber-based collocators (Tier 1 wire centers). SBC further argues that the FCC held that CLECs are not impaired without access to DS3 UNE dedicated interoffice transport or interoffice dark fiber transport on any route between wire centers that are either Tier 1 or non-Tier 1 wire centers that contain at least 24,000 business lines or 3 or more unaffiliated fiber-based collocators (Tier 2 wire centers). SBC states that the definition of business line is found in 47 CFR 51.5, which provides:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

SBC argues that its proposed definition of business lines quotes verbatim the definition set out in Rule 51.5. It argues that the manner in which Michigan defines a business customer for rating purposes is irrelevant to the appropriate definition to be used in the interconnection agreement. According to SBC, the FCC has definitively resolved this issue in the *TRRO* and its rules. SBC argues that the Commission is not free to substitute another definition for the one adopted in the FCC's rules.

The Joint CLECs respond that SBC's definition attempts to turn a residence into a business, while the definition proposed by the Joint CLECs merely uses common sense and plain English to limit the definition of business lines to lines purchased by business customers, as required by the first sentence of the FCC's definition.

The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P,[4] UNE-L,[5] or leased line will be counted when it serves a business customer. Therefore, the Commission concludes that the language proposed by the Joint CLECs should be adopted for purposes of the amendment to the interconnection agreements.

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[4] UNE-P refers to the unbundled network element platform, which includes the loop, unbundled local switching, and transport.

[5] UNE L refers to an unbundled loop.

Issue 4. Definition of SBC Affiliate

The parties disagree as to whether a party that has entered into a binding agreement, which, if consummated, would result in its becoming an affiliate of SBC should be counted as an SBC affiliated, fiber-based collocator for purposes of the non-impairment determinations for highcapacity loops and transport prior to the consummation of the agreement. SBC states that its definition of fiber-based collocator is identical to that set out in Rule 51.5, 47 CFR 51.5, which refers to the definition of affiliate in 47 USC 153. That section provides:

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

SBC argues that the Joint CLECs proposed definition would redefine the term to include "any entity that is currently subject to a binding agreement that, if consummated, would result in it becoming an affiliate of SBC as so defined." SBC argues that the proposal is contrary to the FCC's rules. SBC argues that the proposed language targets the proposed merger between itself and AT&T, since it is limited to potential affiliates of SBC, rather than potential affiliates of other parties for whom mergers may be planned. SBC argues that if the FCC had intended to

include inchoate mergers, it could have, and presumably would have said so. Moreover, for purposes of determining non-impairment, SBC argues, it is only relevant to understand that AT&T became a fiber collocator when it was not an affiliate of SBC. On that basis lies the inference that revenue opportunities exist for CLECs at that wire center.

The Joint CLECs respond that because classification of a wire center as non-impaired is one that cannot be reversed, reasonable safeguards should be adopted to prevent basing that determination on temporary facts or circumstances. One such circumstance, the Joint CLECs argue, is when one of the competitive fiber-based collocators at a wire center is imminently subject to a binding agreement to become affiliated with SBC. The FCC's determination in the *TRRO* that when tallying fiber-based collocators for purposes of the transport impairment analysis, parties shall only count multiple collocations at a single wire center by the same or affiliated carriers as one fiber-based collocation. They argue that it makes no sense to close a wire center to unbundling on Monday, if running the test on Friday would yield a different result.

The Joint CLECs argue that the FCC based its determination in part on the theory that when there are multiple fiber-based collocators, CLECs would have alternative providers for obtaining the facilities. However, they argue, if the competitive alternative is about to become an affiliate and make no facilities available to CLECs except on terms consistent with the ILEC, there are no real competitive alternatives and the CLECs are impaired without access to UNEs. They

argue that adoption of the Joint CLECs' proposed language is dictated by common sense, fairness, and the public interest.

The Commission finds that the language as proposed by SBC should be adopted without the language proposed by the Joint CLECs. In the Commission's view, the federal rules do not support the Joint CLECs' position. Contrary to their arguments, the Commission is not free to rewrite the FCC's rules, to improve upon them, or ignore them when arbitrating interconnection terms. Rather, the Commission is bound by state statute to perform the duties delegated to it under the federal Telecommunications Act of 1996, 47 USC 251 *et seq.*, (federal Act), in a manner that is consistent with that act and the FCC's orders and rules. *See*, MCL 484.2201.

Issue 5. Entrance Facilities and Rates

SBC explains that an entrance facility is a form of dedicated transport that provides a transmission path between a SBC wire center and a switch owned by a requesting carrier. SBC states that in the *TRO*, the FCC held that CLECs are not entitled to unbundled access to entrance facilities, and reaffirmed that finding in the *TRRO*. SBC argues that it makes various transport facilities available that CLECs may use as "entrance facilities." It asserts that it will make entrance facilities available, but not at total element long run incremental cost (TELRIC) pricing that is required for UNEs.

SBC argues that this is a correct conclusion based on the FCC's determination that entrance

facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between ILEC central offices. SBC points out that the FCC noted the entrance facility may be the point of greatest aggregation on a CLEC's system. Moreover, SBC argues, CLECs have a unique degree of control over the cost of entrance facilities because they can choose the location of their own switches.

SBC urges the Commission to reject the Joint CLECs' attempt to require SBC to continue to provide entrance facilities at TELRIC-based rates, as violating the FCC's rules. SBC argues that the FCC views entrance facilities as distinct from interconnection facilities.

The Joint CLECs argue that SBC's proposal rests on the ILEC's assumption that it is no longer required to provide unbundled interoffice facilities to connect the CLEC premises or point of presence on the ILEC's network at TELRIC rates. Further, the Joint CLECs argue, SBC's argument confuses the ILEC's limited obligations under Section 251(c)(3) and those required by Section 251(c)(2) of the federal Act. They argue that in both the *TRO* and the *TRRO*, the FCC affirmed that CLECs have a right to interconnect at TELRIC rates with the ILEC's network for the transmission and routing of telephone exchange service and exchange access, pursuant to Section 251(c)(2). Further, the Joint CLECs argue that 47 CFR 59.319(e), which SBC relies upon for its argument that it is no longer obligated to provide interconnection facilities at cost based rates, is limited by its terms to the ILEC's obligations under Section 251(c)(3) of the federal Act,

and does not limit a CLEC's right to obtain interconnection facilities at TELRIC rates.

The Commission finds that the language proposed by the Joint CLECs should be adopted as reflective of the FCC's finding that CLECs still have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2) of the federal Act. SBC's language would eliminate any responsibility to provide those facilities at TELRIC rates, contrary to the FCC's specific findings. *See, TRRO*, ¶ 140.

Issue 6. SBC's Section 271 Obligations

The parties dispute whether and at what rate SBC's obligations pursuant to 47 USC 271 should be included in the amendment to the interconnection agreement required by the FCC's decisions in the *TRO* and the *TRRO*. SBC argues that the parties should negotiate mutually agreeable terms for Section 271 obligations outside the context of this Section 251 amendment. It argues that the Joint CLECs have proposed language that would obligate SBC to continue to provide elements required by obligations under Section 271 at TELRIC rates to meet the "just, reasonable, and non-discriminatory price" required by statute.

SBC argues that the Joint CLECs' proposed language is so poorly written as to be virtually unintelligible, and suffers from fundamental flaws. SBC states that the Joint CLECs' proposed language misstates SBC's obligations under Section 271, and then seeks to import both real and imaginary

obligations under Section 271 into an interconnection agreement amendment offered pursuant to Sections 251 and 252. SBC takes the position that Section 271 obligations do not belong in an interconnection agreement reached pursuant to Sections 251 and 252. Moreover, SBC argues, there are important distinctions between obligations under the different sections of the federal Act. It argues that rate requirements differ: elements provided pursuant to Section 271 are provided at market-based rates that are "just and reasonable" prices, while elements that are required to be unbundled under Sections 251 and 252 are priced at TELRIC. Moreover, SBC argues, the FCC has exclusive jurisdiction to enforce or determine satisfaction of, or compliance with, Section 271 obligations. SBC asserts that the FCC also has jurisdiction over the prices governed by Sections 201 and 202. Moreover, SBC argues, only the FCC may determine to forbear enforcing the requirements of Section 271. In sum, SBC argues, there is no provision in the federal Act granting state commissions authority over determinations with regard to Section 271 in an arbitration pursuant to Sections 251 and 252. Thus, SBC concludes, there is no basis for attempting to impose Section 271 obligations into the parties' interconnection agreements, and such obligations are beyond the scope of this case.

The Joint CLECs argue that because Congress required that Section 271 rates and terms be included in Section 252 interconnection agreements, and because only the Joint CLECs have proposed such rates and terms, the Commission's "baseball" arbitration approach requires that the Joint CLECs' position be adopted. They argue that SBC may not

refuse to include rates and terms for Section 271 elements in interconnection agreements. Citing Section 271(c)(1) and (2), the Joint CLECs argue that the federal act requires that SBC implement the checklist items through its interconnection agreements approved pursuant to Section 252. Moreover, the Joint CLECs argue, the FCC has stated that a Bell Operating Company (BOC) must satisfy its checklist obligations pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions. The Joint CLECs urge the Commission not to confuse the approval and enforcement of Section 271 provisions, which belong to the FCC, with the state's role in establishing rates and terms in interconnection agreements approved pursuant to Section 252.

The Joint CLECs point out that the Commission has established rates for SBC's Section 271 obligations in the past, including those relied upon by SBC to obtain relief under that section from the interLATA[6] proscription. They argue that merely because the FCC has exercised authority over Section 271 rates by prescribing a "just and reasonable" standard does not preempt the state's authority to implement that standard.

The Joint CLECs further argue that they have proposed rates, terms, and conditions for Section 271 elements that are just and reasonable. SBC on the other hand, has not proposed any terms and conditions. Therefore, the Joint CLECs insist, the Commission must adopt the Joint CLECs' proposed terms and conditions, which provide for obtaining elements

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[6] LATA refers to local access and transport area.

available under Section 271 at TELRIC rates, at least temporarily.

However, the Joint CLECs note that they recognize that TELRIC rates are not required for elements obtained solely under Section 271 obligations. Accordingly, they state, their proposal leaves the door open for SBC to propose new rates that, if later approved by the Commission, would immediately replace the TELRIC rates. In their reply brief, the Joint CLECs state that they are withdrawing the request for their proposed language in Section 1.5. That does not completely resolve the issue, however, because they have proposed language for Sections 5.9 and 13 that are also involved in this issue.

The Commission is persuaded that the disputed language proposed by both parties should not be included in the amendment. The *TRO* and the *TRRO* did not affect SBC's Section 271 obligations. Those obligations may be argued and decided at a different time and in a more appropriate proceeding. Moreover, to grant the Joint CLECs' position would essentially require SBC to provide the UNE-P at TELRIC rates, which the Commission has already found would be inconsistent with the *TRO* and the *TRRO*. However, to approve SBC's proposed language in its entirety would exclude provisions for obtaining facilities pursuant to SBC's obligations under Section 271 from inclusion in the interconnection agreement and avoid the approval process required under Section 252. The Commission is still convinced that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252. However, the Joint CLECs must negotiate with SBC concerning terms and

conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action.

Issue 7. Disconnect or Conversion of High Capacity Loops, Transport, and Dark Fiber

SBC objects to a proposal by the Joint CLECs to include, as Section 4.4 of the amendment, the following language:

> SBC will process orders for DS1/DS3 High Capacity Loops, DS1/DS3 Dedicated Transport or Dark Fiber Transport conversion or disconnection consistent with the end of the applicable transition period identified in Section 4.1.1.4. SBC will not convert or disconnect these services prior to the end of the applicable transitional period unless specifically requested by the CLEC.

SBC argues that the proposed language is vague and its purpose is not clear. SBC muses that it may be that the Joint CLECs desire to create an inference that CLECs need not transition their high capacity loops until the last day of the transition period. SBC argues that such a result would be the antithesis of a transition period. SBC argues that if a CLEC has not submitted the necessary orders to transition from elements or combinations that SBC is no longer required to provide as UNEs before the end of the transition period, SBC must be able to convert those elements or combinations to an analogous service.

The Joint CLECs initially note that the reference within the proposed language needs correction to Section 4.1.1.5 rather than 4.1.1.4. They state that the issue here is that CLECs should be entitled to keep their UNE arrangements to the extent allowed for by the agreement through the transition period. They contend that, should a CLEC desire to discontinue a UNE arrangement earlier, it can issue an appropriate disconnect order to SBC. The Joint CLECs note that SBC has limitations on the number of conversions that can be made in a narrow time frame. However, the Joint CLECs take the position that SBC's limitations for conversion should not affect the Joint CLECs' right to UNE pricing up to the last minute.

The Commission finds the Joint CLECs' argument persuasive. At the conclusion of the transition period, all CLECs should be operating without reliance upon elements no longer required to be provided at UNE pricing. However, during the transition period, SBC may not disconnect these services without the CLEC's prior authorization or request. The Commission therefore adopts the Joint CLECs' proposed language for Section 4.4. The Commission expects the CLECs to work with SBC to ensure an orderly transition that minimizes disruption to customer service.

Issue 8. Charges for Transition

SBC proposed Section 2.1.3.3 of the amendment to require CLECs to pay non-recurring charges associated with the transition of their embedded customer base from *TRO* affected enterprise market

unbundled local switching (ULS) and UNE-P. SBC asserts that it will only charge CLECs the applicable service charges set out in the interconnection agreement's pricing schedule, unless physical work is necessary. In the event that physical work is required, SBC argues that non-recurring charges provided for in the interconnection agreement should apply.

SBC urges the Commission to reject the Joint CLECs' proposed language which would prohibit SBC from imposing "any termination, reconnection, disconnection, or other nonrecurring charges, except for an Electronic Service Order (Flow Through) Record Simple charge" and would require that "any discontinuance of any *TRO* Remand Declassified Element and the conversion shall take place in a seamless manner that does not affect the customer's perception of service quality." CLEC proposed language Section 2.1.3.3.

In short, SBC argues, the Joint CLECs' proposed language would require SBC to perform massive amounts of work without compensation. Thus, it would violate SBC's statutory and constitutional rights to just compensation and must be rejected.

The Joint CLECs state that when they have sought to convert customers from UNE-P to UNE-L, SBC has attempted to bill a port disconnect fee for a stand alone port ($7.60) and a service order charge for the port disconnect ($1.77), even though the CLEC did not request a port disconnect or issue an order requesting a port disconnect. The Joint CLECs insist that disconnection charges are improper and should not be permitted.

Further, the Joint CLECs argue that MCL 484.2301(1)(m) prohibits SBC from bundling unwanted services or products for sale or lease to another provider. They argue that SBC violates that section when it bundles a port disconnect and related service order charge with a CLEC's order for loop connection.

In its reply brief, SBC argues that when a CLEC orders conversion of a UNE-P to UNE-L, that conversion requires a port disconnect in order to perform the requested task. Thus, it argues, it is justified in charging the port disconnect fee. Beyond that, however, SBC states that if a CLEC has a dispute concerning whether SBC's billing is appropriate, it may use the dispute resolution procedures in the interconnection agreement. SBC argues that this case is not a proper forum for resolving billing disputes.

The Commission is persuaded that the Joint CLECs' proposed language should be adopted. The Commission is concerned that SBC impose only the appropriate charges for these conversions. The process will be costly enough without the addition of charges for which there is no justification. Where no physical work is required there should be no charges other than the service order record simple charge. If SBC charges for work not done or imposes charges inconsistent with the interconnection agreement, the affected CLEC may object to that through the dispute resolution provisions in their respective interconnection agreements. Further, the Commission finds that a port disconnect fee is not appropriate when transitioning off of UNE-P to a UNE-L for this transition period.

Issue 9. Post Transition Period Rates for ULS or UNE-P

The parties dispute the appropriate charge for ULS or UNE-P if the CLECs fail to submit orders to transition their respective embedded base of ULS/UNE-P customers to an alternative serving arrangement in a timely manner.[7] SBC has proposed that it charge market-based rates, which it defines as the Local Wholesale Complete™ rate, which it argues is available in the market and is service closest to the UNE-P.

SBC argues that the Joint CLECs' position, that SBC should convert lines for which the CLEC has failed to request alternative arrangements to "Total Service Resale" rates, is not appropriate. First, SBC argues that, as the wrongdoer, the CLEC should not be permitted to choose its own consequences. If the CLEC desires to convert its embedded customer base to resale, it is free to do so, submitting the necessary orders to accomplish that before the end of the transition period. Second, SBC argues, the Joint CLECs' proposal is unworkable. SBC states that it cannot convert all of the features on a UNE-P account to a resold account, because resold lines can only contain those offerings or features that SBC offers on a retail basis. CLECs may offer features to their retail customers that SBC does not offer, and are thus not available on a resold basis. SBC asserts that its

[7] Language to which the parties have agreed states that a delay in transfer past the end of the transition period caused by SBC will result in a price for ULS or UNE P in the pricing schedule plus $1.00.

market-based UNE-P replacement alternative does not have this problem.

The Joint CLECs argue that SBC's proposal would allow the company to unilaterally implement "market pricing" – an ambiguous term that creates risk and uncertainty in business planning. They argue that the FCC balanced the economic impact of the transition for CLECs and ILECs and created economic impacts that would be predictable and unaffected by gamesmanship on either side. The Joint CLECs contend that their proposed language is consistent with the FCC's objectives as well as public policy.

The Joint CLECs state that if, for whatever reason, a CLEC's embedded base of ULS/UNE-P arrangements have not been fully migrated to alternative arrangements or disconnected at the end of the 12-month transition period, SBC should restate those in-place arrangements at Total Service Resale, the retail price of the service minus the wholesale avoided cost discount, rather than market-based rates that SBC proposes. The Joint CLECs argue that it is appropriate to reject the market-based pricing because it is SBC that implements the final steps necessary to complete the migration of the CLEC's customers to an alternative service arrangement. They argue that providing SBC an economic reward for not completing a migration in a timely fashion provides the wrong incentives.

Moreover, the Joint CLECs argue, because there is no market for UNE-P or mass market ULS, the concept of a market-based rate is fiction. Thus, adopting SBC's proposal, the Joint CLECs argue,

would adopt an unknown rate based on a non-existent market. In fact, the Joint CLECs argue, SBC has not proposed a rate, while the resale rate has been established by the Commission.

The Joint CLECs argue that their proposal will fully compensate SBC for the service provided. They argue that there is no dispute that the components of the service the customer receives before March 11, 2006 are the same service components the customer would receive on and after March 12, 2006, unless the customer is migrated to an alternative service arrangement. They argue that if SBC had completed the migration to resale service, it would be entitled only to the resale rate established by the Commission.

The Commission finds that the parties should diligently work to achieve the transition required by the FCC's orders on time. To that end, the Commission directs all CLECs to provide SBC with a transition plan no later than October 20, 2005. SBC shall file a report by November 21, 2005, listing the CLECs for which they have worked out a transition plan consensus. Unreasonable delay on any party's part may be considered a dispute that may be brought before the Commission after any interconnection agreement dispute resolution procedures have been completed. However, should the transition not be completed by the transition period end date, the Commission is persuaded that the process and billing proposed by SBC should be implemented. SBC has every incentive to expeditiously transition the CLECs away from UNEs. Its language does not interfere with that incentive in the least. If SBC causes a delay past the end of the transition period, although the CLEC

has submitted a timely order, a much lower rate will apply, as provided in the agreed language. If a CLEC fails to provide the required plan and to facilitate transition, SBC may charge that CLEC for local wholesale complete (LWC) at the end of the transition period should the transition not be completed on time.

Issue 10. Rates for Converted Loops During the Transition Period

The Joint CLECs proposed language for Section 2.1.4, which provides that, unless the CLEC requests or agrees otherwise, the FCC-established transition rate for UNE-P should apply to the CLEC's entire embedded base of UNE-P customers until the end of the transition period, even after those lines are converted to a new arrangement prior to the end of the transition period. In this manner, the Joint CLECs argue, the conflict between the CLEC's desire to retain the transition rate during the entire 12-month period and the ILEC's desire to begin the UNE-P transition sooner than the end of the transition period may be resolved. In the Joint CLECs' view, this proposal would support accomplishing an orderly transition envisioned by the FCC, because it would eliminate financial incentives for either party to push the limits.

The Joint CLECs argue that the FCC carefully delineated the functional from the financial aspects of the transition. By eliminating dysfunctional incentives on both sides, the Joint CLECs argue, the FCC promoted its goal of encouraging the parties to reach commercial agreements expeditiously.

Moreover, the Joint CLECs argue, the FCC's rules support the existence of a full 12-month transition period for rate purposes. They argue that in 47 CFR 51.391(d)(2)(ii) and (iii), the FCC broke the nexus between the operational and economic aspects of the transition, by the phrase ". . . notwithstanding paragraph (d)(2)(i) of this section . . .." They argue that SBC's proposal to charge a different, higher rate for a functionally equivalent service arrangement prior to the end of the transition period is "directly at odds with" the FCC rule and the FCC's stated intent to foster an orderly transition process.

SBC argues that under the Joint CLECs' proposed Section 2.1.4, the FCC's prescribed transition rate for the embedded base of UNE-P/ULS would continue to apply through March 11, 2006, even if the transition to a different configuration should occur sooner, unless the CLEC requests otherwise. SBC takes the position that the Joint CLECs want to pick and choose what rates they pay after the "unlawful UNE-P service has been discontinued." SBC brief, p. 26.

SBC points out that the FCC adopted a transition plan providing over a year to enable CLECs to move from ULS/UNE-P to alternative serving arrangements. It states that many CLECs have taken their obligations to transition seriously and have either already converted their embedded base to other arrangements or have plans in place to do so. It asserts that the FCC's intention was not to create an opportunity for CLECs to wait until March 10, 2006, before seeking to flash cut their UNE-P lines to other arrangements. Equally, SBC asserts, the FCC did not

intend that the parties pretend that all conversions will take place on March 10, 2006 for purposes of applying rates, assuming that those conversions are to alternatives offered by SBC. In SBC's view, the Joint CLECs' proposal would disadvantage those CLECs that have already transitioned their customers to lawful serving arrangements and would "favor those CLECs who want to play games." SBC brief, p. 27. Moreover, SBC argues, the proposal would be impossible to administer and is inconsistent with the *TRRO* transition mechanism.

Additionally, SBC argues, the proposal would require SBC to bill different rates to a single CLEC for exactly the same offering. If a CLEC determined to transition its embedded customers to resale, for example, SBC would be charging that CLEC the UNE-P transitional rate or the resale rate for the same services, dependent only upon whether the line was transitioned to resale rather than a new connection. SBC asserts that this proposal would require manual billing adjustments for every transitioned line.

The Commission is persuaded that SBC should continue charging CLECs the transition charge until the end of the transition period, once the CLEC has converted its lines to another service, unless other terms have been negotiated between those parties. The Commission emphasizes that it is in the interest of all industry participants to manage their affairs in such a manner as to contribute to the orderliness of the transition. The Commission finds that a balanced reading of the *TRRO* justifies the requirement proposed by the Joint CLECs. Therefore, the

Commission concludes that the language proposed by the Joint CLECs should be adopted.

Issue 11. This issue has been resolved by the parties.

Issue 12. Limit on Obtaining DS1s as UNEs

The Joint CLECs state that the parties agree that CLECs are limited to 10 DS1 transport circuits on a route for which DS3 transport is not available, and to 12 DS3 transport circuits on any route. However, the Joint CLECs argue, SBC's language fails to restrict these limitations to wire centers where CLECs are deemed to be non-impaired without access to DS3 transport. They state that the intent of the limit on DS1s is to prevent a CLEC from evading the elimination of DS3 transport UNEs by ordering large numbers of DS1 circuits instead. They argue that where DS3 transport is available, there would be no rule to evade, and any CLEC request for DS1 circuits rather than DS3 circuits should be presumed legitimate. The Joint CLECs quote from paragraph 128 of the *TRRO* as follows:

> *Limitation on DS1 Transport*. On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is

> efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

Id.

The Joint CLECs argue that paragraph 128 of the *TRRO* clarifies that the cap only applies when DS3 transport is not available as a UNE. It argues that notwithstanding the omission of that explanation in the FCC's rules, the FCC order has the force and effect of law, and the rules must be read in conjunction with the rest of the *TRRO*. It urges the Commission to adopt the position of the New York Public Service Commission on this issue and adopt the Joint CLECs' proposed language for Section 3.1.4.1.

SBC argues that the Joint CLECs' proposal is inconsistent with the *TRRO* and the FCC's rules. It states that 47 CFR 51.319(e)(2)(ii)(B) provides:

> A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

Id.

SBC argues that this cap is not dependent upon whether DS3 transport is available as a UNE. It states

that the FCC determined that a CLEC should purchase DS3s or comparable facilities once it reaches the cap on DS1 circuits. SBC argues that the manner in which the DS3 facility is offered is irrelevant.

Furthermore, SBC argues, the Joint CLECs' proposal would permit a CLEC to obtain the DS3 from SBC at TELRIC rates, rather than access rates, whenever DS3 is available as a UNE. In SBC's view, the Joint CLECs' proposal would lead to subversion of the FCC's non-impairment determinations by allowing a CLEC to order an unlimited number of DS1 transport circuits in order to avoid hitting the DS3 dedicated interoffice transport cap.

The Commission finds that SBC has the more persuasive argument. In the Commission's view, the Joint CLECs' argument ignores the meaning of the last sentence of paragraph 128 of the *TRRO*, and fails to take into account ¶ 181 and fn 489 of the *TRRO*. When DS3s are available, the CLEC may not purchase more than ten DS1s. DS3s are available for transport between wire centers of which one must be a Tier 3, the least competitive classification of wire center. If in the wire centers in which DS3s are available, a CLEC has traffic requiring more than ten DS1s, it may efficiently employ DS3 transport. Therefore, the Commission concludes that the provisions of 47 CFR 51.319(e)(ii)(B) are consistent with the discussion in the *TRRO* on this issue, without the Commission inserting additional, limiting language as suggested by the Joint CLECs.

Therefore, the Commission finds that the Joint CLECs' proposed language should be rejected for Section 3.1.4.1.

Issue 13. Charges to Transition the Embedded Base of High Capacity Loops.

SBC points out that this dispute is essentially the same as the dispute in Issue 8, addressed earlier. The Joint CLECs state that this issue is essentially the same as Issue 29. The Commission finds that this issue is similar to both Issues 8 and 29, and concludes that these issues should be resolved consistently with one another. In Issue 8, the Commission adopted the Joint CLECs' proposed language, and admonished SBC not to impose charges for work that is not necessary to complete the conversion. As noted by the FCC, much of the change is merely a billing function. The language proposed by the Joint CLECs is adopted.

Issue 14. Updating List of Non-Impaired Wire Centers

SBC proposes language for Section 4.1.1.1 that SBC contends will permit it to update the list of non-impaired wire centers as relevant changes occur. It argues that the Commission should reject the Joint CLECs' proposal to limit SBC's ability to update to once every six months. SBC argues that the only purpose served by the Joint CLECs' proposal is to prevent SBC from obtaining relief to which it is entitled under federal law.

Moreover, SBC argues, as a practical matter, SBC cannot update its non-impaired wire center list

based on business line counts more frequently than once annually, because the business line counts depend upon ARMIS 43-08 data that is only produced on an annual basis. On the other hand, SBC states, the count of fiber-based collocators may change more frequently, and, it argues, there is no basis to prevent SBC from reflecting those new collocators. It states that given the cost to update the fiber-based collocator counts, SBC would not likely perform this more frequently than once per quarter.

SBC complains that an arbitrary six-month limitation would enable CLECs to game the system by turning up new fiber-based collocations immediately after an update in order to obtain an additional six months of access to unbundled high capacity circuits to which they should not be entitled.

The Joint CLECs argue that the *TRRO* did not discuss a time frame for additional wire center updates. They contend that it is important that the updates occur in a structured manner so as not to unduly disrupt end users and to permit CLECs to develop and follow business plans in an appropriate manner.

The Commission finds that the Joint CLECs' proposed language should be adopted. There is no requirement in the *TRRO* concerning this issue, but as SBC has conceded that it would not be updating the list any more frequently than once per quarter, the Commission finds that once in a six-month period should be not be unduly burdensome to the ILEC. The Commission is not persuaded that the tactics SBC envisions are likely to occur. Certainly, there are more

important factors for considering when to implement a fiber-based collocation than when the last update to the count was done.

Issue 15. Issue 15 has been resolved by the parties.

Issue 16. Time Limits on Self-Certification

SBC states that Sections 4.1.1.4, 4.1.1.6, and 4.1.1.9 address the process by which impairment decisions are made with respect to any wire center that may be currently listed as impaired, but may become unimpaired. It states that the FCC was silent as to the process by which future additions to the list of unimpaired wire centers should be accomplished. SBC argues that it has proposed a straightforward process that begins with its notifying CLECs of additional designations of unimpaired wire centers by Accessible Letter and by posting on line. For the next 30 days, SBC states, it will continue to accept and process orders for the affected high capacity loops or transport even without CLEC self-certification. Its proposal further provides CLECs 60 days after issuance of the Accessible Letter to self-certify that it is entitled to obtain the affected loops or transport as a UNE. If it does not self-certify, the CLEC will be required to transition the affected high capacity loops or transport. If the CLEC does self-certify within 60 days, the parties will follow the dispute resolution process set forth in the Commission's March 29, 2005 order.

In contrast, SBC argues, the Joint CLECs' proposed language would impose no time limits on their ability to self-certify. Because, SBC argues, any CLEC self-certification would effectively permit all

CLECs to order high capacity circuits in that wire center, the possibilities for abuse are obvious. This is particularly evident, SBC argues, in the self-certifications that were later withdrawn without the Commission having an opportunity to rule on the issue. SBC argues that such a provision would result in a complete frustration of the self-certification process.

The Joint CLECs argue that the FCC did not limit when self-certification should be provided by the CLEC. They contend that a CLEC may have a valid business reason to self-certify only at some time after 60 days from issuance of the Accessible Letter.

The Joint CLECs further contend that SBC will not be prejudiced by permitting selfcertifications more than 60 days after the issuance of an Accessible Letter. They state that if a CLEC does not self-certify within 60 days, the CLEC would have to transition the circuits it then has off of UNEs, regardless of a subsequent self-certification. However, a CLEC might still self certify for new loop and transport orders in a wire center for which SBC had issued an Accessible Letter more than 60 days prior. In this manner, the Joint CLECs argue, the Commission will preserve a CLEC's ability to self-certify at a later date, when it might have a business reason sufficiently significant to justify the time and expense of self-certification and defending SBC's challenges to that self-certification. Moreover, the Joint CLECs point out that such later self-certifications would be available only for wire centers for which the Commission has not made a prior determination that the wire center is unimpaired.

Finally, the Joint CLECs argue that the Commission should adopt their proposal because it would prevent unnecessary litigation that will arise should the CLECs be forced to litigate matters where their present business needs do not economically justify the resources necessary to do so.

The Commission is persuaded that there should be no express time period after which a CLEC may not challenge the ILEC's designation of a wire center as unimpaired by self-certification. To establish such a deadline would encourage the ILEC to designate wire centers as unimpaired prior to there being significant activity within the wire center. Without significant activity, there is small likelihood that a CLEC would consider spending the time or resources to challenge the designation. Should the abuse of process that SBC fears occur, SBC could object to granting the withdrawal and dismissing the proceeding. At that juncture, the Commission could choose not to permit the withdrawal of the issue of whether a particular wire center is unimpaired. Thus, SBC need not be unduly prejudiced by this resolution.

Moreover, the Commission notes the Joint CLECs' assertion that SBC will not endure the negative results it fears because when a CLEC has failed to self-certify within 60 days, it must transition its lines away from UNEs despite any future self-certification. The Joint CLECs do not cite the language that they believe requires this result, but the Commission agrees that that result should occur. The parties are directed to include language that reflects the Joint CLECs' assertions in this respect.

Issue 17. Transition Time for Subsequent Unimpaired Designations

This issue concerns the appropriate amount of time within which a CLEC must transition from UNEs to other arrangements once a wire center has been designated as unimpaired and the period for self-certification has expired without any CLEC submitting a self-certification to obtain high capacity loops and transport. The resolution of this issue will determine the appropriate language for Section 4.1.1.5.

SBC proposes that CLECs have 90 days after SBC designates an office as unimpaired (assuming no self-certification is made). In contrast, the Joint CLECs propose 12 months for high capacity loops and DS1 and DS3 dedicated transport and 18 months for dark fiber dedicated transport.

SBC argues that the Joint CLECs' proposal violates the *TRRO* and maintains that there is no rational basis for allowing CLECs to continue to purchase high capacity loops and transport as UNEs for up to 18 months after a determination that they are not impaired without access to such loops and transport. SBC argues that CLECs have alternative means to serve their customers, including access services. In SBC's view, the CLECs should not be entitled to the lengthy periods adopted by the FCC for post transitional period designations. SBC argues that these later determinations will not create the same "significant changes to the regulatory framework for high capacity loops and dedicated transport," because the CLECs have now had ample notice of the coming change. SBC brief p. 33.

The Joint CLECs take the position that the FCC's analysis and conclusions in the *TRRO* should apply to any subsequent wire center designation to support setting 12- and 18-month time frames for transitioning off UNEs in a newly designated wire center. They argue that the FCC determined that "the twelve-month period provides adequate time for both [CLECs] and [ILECs] to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities." *TRRO*, ¶ 144.

The Joint CLECs argue that SBC has not presented any reason to justify its proposed greatly shortened transition time frame. In fact, the Joint CLECs argue, they still consider the FCC's time line to be too short, but are willing to compromise to offer its proposed contract term. Moreover, they argue that they have offered to pay a 15% increase for UNEs during the transition period to mirror the transition terms imposed by the FCC in the *TRRO*. They contend that the FCC has repeatedly found that sufficient transition periods are necessary to avoid "flash cuts," which are disruptive to carriers and their customers. They insist that the 12- to 18-month time periods are necessary, because the CLECs will have to make the same types of adjustments when loop and transport UNEs are eliminated in the future as they do for the current transition. They note that the work that must be performed to self provide or lease facilities are the same as for wire centers that were the subject of the *TRRO*. The Joint CLECs state that weather uncertainties and unforeseen delays in available facilities make it hard to believe that conversions for

multiple CLECs in a given office, can take place 30 days from the end of a 60-day notice period as SBC proposes.

The Commission is persuaded that the Joint CLECs' proposed language should be adopted after modification to provide 9 months for transitioning high capacity loops and transport and 12 months for transitioning dark fiber transport. In the Commission's view, this renders the Joint CLECs' proposal reasonable. The Commission finds that SBC's proposal is not reasonable, because it creates a time frame that is too tight for conducting an orderly transition away from UNEs. Further, although the Joint CLECs state in their brief that they are willing to pay a 15% increase during the transition period, they do not cite the contract language that would include that offer. The Commission finds that the parties should agree on language that will provide for the CLECs to pay a 15% surcharge on those services during the transition period. Moreover, the Commission finds that the parties should develop language to which they can agree that does not require SBC to provision new (not ordered prior to the transition period) high capacity loops and transport or dark fiber transport during the transition period. The language proposed by the Joint CLECs appears ambiguous.

Issue 18. Transition for High Capacity Loops and Transport

SBC argues that the language proposed by the Joint CLECs suggests that SBC may not charge for cross connects until the date of conversion of the high capacity loop. The Joint CLECs argue that their

proposed language is intended to require minimizing the disruption to customers during the transition. SBC says it will minimize disruption to customers without the Joint CLECs' language. The arguments in the parties' briefs seem to miss each other.

In their reply brief, the Joint CLECs argue that if SBC's reading of the agreed to language in Section 4.3 is consistent with SBC's statement on page 35 of its brief, then the Joint CLECs no longer insist on their chosen wording.

The Commission concludes that the language proposed by SBC should be adopted, with the understanding that the contract language will not be interpreted in a manner inconsistent with SBC's statement on page 35 of its brief in this case.

Issue 19. Redundancy

In certain circumstances, customers desire redundant facilities for the sake of reliability. The dispute in this issue is how to price the facilities for service to a building served by two wire centers, only one of which is impaired, when the building is physically located in the serving area of the unimpaired wire center.

SBC argues that its proposed language actually imposes obligations on SBC beyond those required by the current unbundling rules. SBC cites the requirement that it must provide unbundled "access to DS1 and DS3 loops 'to any building not served by a wire center' meeting the FCC's non-impairment thresholds." SBC brief, p. 35. Thus, SBC reasons, it is

not required to provide such access to any building that is served by a wire center that meets the applicable standard for an unimpaired wire center, despite whether that building is served by another wire center as well. SBC states that it offered to permit CLECs to obtain unbundled access to DS1 or DS3 loops to any building that is physically located in the serving area of an impaired wire center. SBC states that although its offer goes beyond the strict requirements of the rules, SBC believed it to be consistent with the intent of the rules and with the FCC's loop impairment determinations, which are based in part on the likelihood that fiber facilities will be deployed in a geographic area served by a particular wire center.

However, SBC argues, the Joint CLECs' proposed language is contrary to both the rules and the loop impairment analysis in the *TRRO*. It argues that the FCC has determined that CLECs are not impaired without access to high capacity loops when a building is served by a wire center that is not impaired.

The Joint CLECs argue that their proposed language would permit a customer to retain redundant service when the building is located in a serving area of an unimpaired wire center, but is served using both an impaired and an unimpaired wire center.

The Commission finds that the language as proposed by SBC should be adopted for the interconnection amendment. The FCC's orders and the rules identify the serving wire center as the determinant for whether unbundled high capacity loops are available. The Commission approves of SBC's proposal to permit that access where the building is

located in the serving area of the impaired wire center. However, it cannot and will not require SBC to provide unbundled high capacity loops to a building located in the serving area of the unimpaired wire center. Contrary to the Joint CLECs' assertions in its reply brief, this finding does not prevent customers from obtaining redundancy, although it may affect the method and cost for the CLEC to provide it.

Issue 20. Advance Notice for Wire Centers Approaching FCC Thresholds

The Joint CLECs propose language for Section 4.8 that would require SBC to post on a quarterly basis information advising when it believes a wire center has reached 90% of the number of business lines needed for the wire center to be classified as a Tier 1 or Tier 2 wire center, and to specify which wire centers it considers to have 2 or 3 fiber collocators. The Joint CLECs argue that because SBC certainly keeps track of this information, it is reasonable for SBC to share the information with CLECs for planning purposes.

SBC argues that the Joint CLECs' proposed language would impose a significant and impossible burden on SBC, and would require SBC to divulge highly confidential, competitively sensitive information. Moreover, SBC argues, it cannot provide business line information on a quarterly basis because it uses ARMIS data that is available on an annual basis.

Moreover, SBC argues, it incurred significant expense to physically inspect wire centers to determine the locations that met the FCC's threshold for non-

impairment. It did not inspect all of its wire centers, only those that it believed were substantially likely to meet that threshold. SBC states that it has not performed the work necessary to determine the number of fiber-based collocators present in each wire center. Thus, it argues, the Joint CLECs would require a substantial amount of work without any offer to compensate SBC for its trouble.

The Commission is not persuaded that the Joint CLECs' proposed language should be adopted. There is no requirement that SBC provide this information, it does not have the information on the timing that the Joint CLECs seek, and SBC should not be required to gather it without compensation to support the planning activities of the CLECs. Moreover, the result reached on Issue 17 should provide the CLECs with sufficient time to deal with newly declared unimpaired wire centers.

Issue 21. Commingling

The Joint CLECs proposed language for Section 5.1 that would require SBC to provide a commingling arrangement if SBC or any "SBC RBOC"[8] affiliate provides the commingled arrangement to a CLEC anywhere in the United States. The Joint CLECs argue that if an SBC affiliate provides a particular commingled arrangement, that would demonstrate the technical feasibility of that arrangement, and Michigan CLECs should be able to purchase the same.[9]

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[8] RBOC refers to "regional Bell operating company."

[9] Commingling refers to instances in which a CLEC wishes to connect a UNE or combination of UNEs with a facility or service that SBC offers at wholesale.

The Joint CLECs argue that SBC has provided similar lists of available commingled arrangements in states such as Texas and Missouri. Also, the Joint CLECs assert, SBC has indicated its desire to use the Michigan baseline document as a baseline for negotiations and discussions in Illinois and Ohio. Thus, they argue, SBC is capable of having processes or developing similar processes across its RBOC operating areas. In its reply brief, the Joint CLECs state that any SBC claim to differences between RBOCs is not based on any testimony and is, therefore, unfounded and speculative.

The Joint CLECs argue that if their proposed language is not approved, they will be required to use the bona fide request (BFR) process, which they argue is time-consuming and expensive, in situations in which BFRs should not be needed. Unnecessary use of the BFR process, they argue, will increase costs for CLECs and impose time barriers, both of which will impede competition.

SBC argues that commingling is available in instances where a CLEC wishes to connect a UNE with a facility or service that SBC offers at wholesale. In SBC's view, the Joint CLECs' proposed language would require SBC to offer commingling even if SBC does not offer the particular facility or service that the CLEC wishes to commingle. SBC asserts that there can be no duty to offer commingling if SBC does not offer the wholesale service that a CLEC seeks to commingle.

The Commission is not persuaded that the Joint CLECs' position must be adopted. In its reply brief,

SBC states it initially announced the available processes for commingling that were consistent across all of the states in the Midwest region (Illinois, Indiana, Michigan, Ohio, and Wisconsin). However, there were regional differences between the processes that were available because those processes had to account for the regional differences between the various SBC affiliates. SBC commits that it will not develop a process that supports offerings available to CLECs in Michigan and declines to offer it to Michigan CLECs. Additionally, should SBC fail to honor that commitment, the CLECs may challenge a refusal in an appropriate case. Therefore, the Commission finds that SBC should be able to provide in Michigan any commingling available within SBC's midwest region, consistent with the ILEC's own assertion. The parties shall include language to reflect this finding.

Issue 22. Special Access Tariffs

a. Termination Penalties

The dispute for this issue manifests itself in the Joint CLECs' proposed language for Sections 4.9 and 5.8 of the amendment. The Joint CLECs note that for situations in which a CLEC is forced off of DS1 and DS3 high capacity loops, a CLEC may incur early termination penalties for disconnecting related special access or collocation arrangements that are no longer useful without the high capacity loops. They argue that any termination penalties SBC may impose on the disconnecting CLEC in such a situation must be limited to a reasonable amount. In Section 4.9, the Joint CLECs propose language that limits any early termination penalty to the price differential between

the tariff term and the actual term of the service or facility, except for special construction collocation and transport.[10] In the Joint CLECs' view, this proposal is a compromise between no termination penalties and the penalties that might be imposed pursuant to tariff provisions.

SBC argues that the Joint CLECs have proposed abrogating SBC's rights under tariff and contract for access services by eliminating or reducing termination liabilities under those agreements or tariffs in the event a wire center is determined to be non-impaired for high capacity loops or transport. Further, SBC argues that this proceeding is to resolve interconnection disputes arising out of Section 251 and Section 252 of the federal Act, the TRO, the TRRO, and related FCC orders. In SBC's view, there is no basis to interject into this proceeding issues concerning services that are provided under SBC's tariffs or contracts for access services. It explains that SBC's access tariffs mirror its federal tariffs. Thus, SBC argues, the Joint CLECs are attempting by arbitrated contract to alter the ILEC's federal access tariffs. SBC argues that the Commission has no authority to grant the CLECs' request. Moreover, SBC argues, the Commission has no authority to modify contractual termination charges arising out of term contracts for interstate access service.

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[10] For example, the CLECs state, if the tariff term is 48 months, was billed at $300 per month, the circuit was working for 24 months, and the 24 –month rate is $200 per month, the CLEC would pay $2400 (months remaining times rate for shorter period). Any partial months would be paid at the lower tier rate.

Furthermore, SBC argues, the Joint CLECs' proposal is effectively a collateral challenge to the Commission's June 26, 2004 order in Cases Nos. U-13977 and U-14175. SBC further states that Section 310 of the Michigan Telecommunications Act (MTA), MCL 484.2310 permits the parties to enter into arrangements that differ from the tariffs. If the parties cannot agree, SBC argues, an application must be filed pursuant to Section 204 of the MTA, MCL 484.2204, which has not happened in this case.

In its reply brief, SBC responds to the Joint CLECs' argument that SBC is the cause of the wasted facilities, and therefore, should not be permitted to profit from early termination penalties. SBC argues that the Joint CLECs' position is absurd. In SBC's view, the federal Act imposed on SBC the obligation to provide UNEs. What is actually required under the act has been litigated by many parties, determined by the FCC, and adjusted in the courts. SBC argues that the CLECs were aware of the possibility that the FCC would determine that CLECs are not impaired without access to certain UNEs when they made the business decision to enter into long term agreements, and receive the consequent benefits. SBC asserts that there is no factual or legal basis for the Commission to void those contractual commitments. Moreover, to permit CLECs to avoid the consequences of their decision to enter into long term agreements, would discriminate against every other CLEC that did not agree to a longer term in order to minimize their potential exposure.

The Commission concludes that it should adopt SBC's position on this issue. Special access is not a

service generally covered by interconnection agreements, because it is not required or provided pursuant to 47 USC 251(c)(3). Further, the Commission is not aware of any FCC determination that CLECs should be relieved of contract terms for special access, based on the changes wrought to the industry in the TRO and the TRRO. If a CLEC needs assistance with obtaining agreeable terms for access services, they may pursue that desire using the appropriate channels. However, the Commission is not in a position to void long term contractual commitments the CLECs made. Therefore, the Commission rejects the language proposed by the Joint CLECs on this issue.

b. Notice of Access Tariff Changes

In Section 5.8 of the amendment, the Joint CLECs propose additional language that would require SBC to provide 60 days' prior notice of any proposed change to its access tariffs that eliminates the availability of a product "that would restrict or impact the availability or provisioning of commingled arrangements under this attachment or the Agreement." Section 5.8. The Joint CLECs seek to add to that requirement a requirement that SBC "grandfather in place commingled arrangements that have been ordered prior to the access tariff effective date." *Id.*

SBC's brief argument references its response to the Joint CLECs' proposal for Section 4.9, and essentially relies upon its argument that the Michigan tariffs mirror the FCC tariffs in all respects. In its reply brief, however, SBC argues that the CLECs

should receive the same notice that every other access customer receives in accordance with the FCC's rules and SBC's federal access tariffs. It argues that the Joint CLECs' request for preferential treatment is discriminatory and beyond the scope of this proceeding. It notes that all customers using an access service would be affected if it were phased out, not just a CLEC.

The Commission is persuaded that SBC's position should prevail on this issue for the same reasons that the Commission reached its conclusion in subsection a. of this issue.

Issue 23, Audit Procedures -Challenge

In order to obtain certain elements and combinations of elements, a CLEC must self-certify that it meets the appropriate criteria to obtain those elements. To police the self-certification, the ILEC has the right to employ an independent auditor. In Section 6.3.8.4 of the amendment, the parties dispute whether the CLECs should pay disputed amounts into escrow if an auditor determines that a CLEC is not in compliance and the CLEC disagrees with the conclusions of an auditor's report.

The Joint CLECs propose that the parties should resolve disputes concerning the auditor's report, without requiring the CLEC to pay the disputed amount, until the Commission has had an opportunity to rule on the issue.

In their brief, the Joint CLECs state that no payment should be required until after a decision

approving the audit result. They state that without the ability to withhold payment pending dispute resolution, the financial responsibility for invalid charges would rest upon the disputing party, which they say is contrary to the underlying interconnection agreements. They argue that no automatic payment should be required, but rather the actual damages provisions of the underlying interconnection agreement should control.

SBC takes the position that there is no basis for withholding payment once an independent auditor has determined noncompliance, even if the affected CLEC disputes the findings. It argues that noncompliance is a matter of the CLEC's misrepresentation as to its eligibility to obtain the EEL. Further, the noncompliance has not been voluntarily disclosed as inadvertent error, but has been discovered through an audit, initially paid for by SBC.

SBC argues in its reply brief that whatever the merits of permitting a CLEC to withhold payment pending a dispute, there is no basis for doing so once an independent auditor has determined noncompliance. That this places certain financial responsibility on the disputing party is, in SBC's view, appropriate and a common manner of handling a billing dispute.

The Commission is persuaded that the SBC's proposed language should be adopted for Section 6.3.8.4. At the point of an independent auditor's determination of noncompliance, SBC has already invested significant resources into determining noncompliance. It appears to the Commission that

payment of disputed amounts into escrow is a reasonable method to ensure prompt payment upon Commission determination.

Issue 24, Audit Procedures– Reimbursement

In Section 6.3.8.5, the disputed language relates to when and how much of the audit costs the CLECs must pay SBC if the CLEC has been found to have falsely self-certified its eligibility for EELs. SBC proposes that if the CLEC is found to have 10% or more of the circuits investigated noncompliant with FCC requirements, it must pay 100% of the audit costs. If noncompliance is limited to less than 10%, SBC would have the CLEC reimburse the ILEC in an amount that is in direct proportion to the number of circuits found to be noncompliant.

The Joint CLECs, on the other hand, would prefer to reimburse SBC for audits only to the extent (pro-rata) that their circuits are found to be noncompliant, as compared to the total number of all circuits leased by the CLEC which were the subject of the audit.

The Commission finds that the language as proposed by SBC should be adopted for this provision. In the Commission's view, it is a CLEC's responsibility to ensure that its circuits are in compliance with the FCC's requirements.. Failure at a level of 10% or more justifies SBC's concerns and should require the CLEC to pay for the audit. A level of less than 10% failure should not result in 100% payment, but payment of costs in relation to the number of circuits found to be noncompliant, as SBC's language provides.

Issue 25 and 26. These issues have been resolved by the parties.

Issue 27. Cost Recovery for Routine Network Modifications

Routine network modifications are those modifications that SBC regularly undertakes for its own customers. SBC argues that those activities are only required where the loop or transport facility has already been constructed. Thus, SBC asserts, routine network modifications do not include the construction of new facilities, such as trenching or placing new aerial or buried cable or constructing new manholes, conduits, or terminal, or obtaining new rights of way for a requesting carrier.

SBC argues that its proposed language will permit it to impose charges for routine network modifications at the rates, terms, and conditions in the agreement's pricing schedule in instances where such charges are not included in the Commission's approved TELRIC-based recurring or nonrecurring charges. SBC argues that in its current nonrecurring charges, it does not recover costs of (1) adding an equipment base, (2) adding a doubler or repeater, including associated line cards, and (3) installing a repeater shelf, to the extent such equipment is not present on the loop or transport facility when ordered.

SBC argues that the Joint CLECs' proposal would not permit SBC to impose any charge for routine network modifications until such time as the

Commission specifically authorized a charge, presumably after a contested case hearing.

The Joint CLECs argue that SBC's proposed language generally assumes that costs it will incur in undertaking routine network modifications on behalf of a CLEC are not recovered in the monthly recurring or nonrecurring charges already approved by the Commission in Case No. U-13531 for UNEs. SBC proposes to impose charges for these modifications on an individual case basis. The Joint CLECs state that, on the other hand, their proposed language assumes that because these network modifications are by definition routine, the network maintenance and rearrangement expenses are already recovered by SBC in the monthly recurring rates it assesses for UNEs. Thus, they argue, there is no need for further charges.

The Joint CLECs acknowledge that it is difficult to envision all potential routine network modifications and state that "it is possible that some rare modification will require activities or materials other than those already accounted for in SBC's TELRIC-based rates." Joint CLECs brief, p. 76. The Joint CLECs argue that they, therefore, included the option to further negotiate, or arbitrate, rates for those circumstances in which SBC believes its costs will not be recovered. The Joint CLECs state that their proposed language is intended to permit SBC to recover its costs, but prevent it from double recovery.

Moreover, the Joint CLECs argue, in previous Commission orders addressing like arguments, the Commission has found that the costs for which SBC sought to impose additional charges were already

included in the approved nonrecurring and recurring charges, without need to impose additional charges. Further, the Joint CLECs state, the Commission determined that if there were any costs that were not likely to be recovered, SBC should pursue altering its methodology for its cost studies to include those unrecovered costs. The Joint CLECs go on to state that in the *TRO*, the FCC indicated that the Commission had taken the right approach.

The Joint CLECs further argue that SBC identifies three specific network modifications that it believes will require additional charges. Those activities, the Joint CLECs argue, are either routinely undertaken in the construction of a loop or transport circuit, with associated materials; is equipment routinely added to existing network infrastructure, with associated expenses recovered in maintenance or other expense factor in the annual charge factors, or recovered as a result of some other comparable equipment given that SBC's forward looking design assumed in the TELRIC studies may rely upon a technology that does not require this specific equipment. Therefore, the Joint CLECs argue, permitting SBC to impose additional charges would permit it to double-recover its costs, which the FCC prohibits. *TRO*, ¶ 640.

The Commission finds that the language proposed by the Joint CLECs should be adopted for this issue. The costs for which SBC seeks to impose additional charges should be recovered through the charges approved in Case No. U-13531. If the charges approved in that case do not sufficiently recover SBC's costs, it may seek modification of its cost studies in an

appropriate case. SBC is not permitted to unilaterally establish charges for costs that it asserts must be recovered for UNEs. The Commission notes that the record was not closed until after the *TRO* was issued, after which the Commission specifically invited SBC to modify its cost studies if necessary in light of that FCC decision. SBC chose not to modify its cost studies. The Commission will not now permit SBC to circumvent Commission review and approval of costs that should be included in the approved cost studies. The Commission has repeatedly stated that an arbitration proceeding is not the appropriate forum for review of cost studies. This proceeding has evolved into an arbitration proceeding, and fits within the rule.

Issue 28. Batch Hot Cuts

The Joint CLECs propose as essential, the inclusion of terms and conditions for batch hot cuts in this amendment. They state that the proposed language was sent to SBC on June 10, 2005, updating the language proposed on May 31, 2005, to make it closer to the language and terms the Commission approved in its June 7, 2005 order in Case No. U-14463. Those revisions, the Joint CLECs state, include an increase in the rate for batch hot cuts.

The Joint CLECs argue that the provisions for batch hot cuts should be included in the interconnection agreement because the FCC based its *TRRO* ruling that CLECs are not impaired without local switching as a UNE on the availability of batch hot cut processes. They state that the FCC recognized that the states could further refine these processes. They further argue that United States District Court

Judge Marianne O. Battani's January 6, 2005 order in *Michigan Bell* v *Lark et al*, United States District Court for the Eastern District of Michigan, Southern Division, Case No. 04-60128 (*Batch Order*), should not prevent the Commission from arbitrating batch hot cut provisions for this amendment. In that order Judge Battani enjoined the Commission from enforcing its order in Case No. U-13891, related to batch hot cuts.

Unlike the situation in the *Batch Order*, the Joint CLECs argue, the FCC has now made the determinations concerning impairment, and no impairment determinations have been impermissibly left to the states to consider. In the Joint CLECs' view, the Commission now has ample authority to address the batch hot cut issues without seeking to enforce the enjoined order in Case No. U-13891.

The Joint CLECs argue that because batch hot cuts are required under 47 USC 251 and 271, it is appropriate that terms and conditions for providing batch hot cuts be made a part of the interconnection agreement. Otherwise, the Joint CLECs argue, SBC will argue that it has no obligation to provide batch hot cuts. Moreover, the Joint CLECs claim that SBC has a duty to provide batch hot cut processes beyond the current time of transition. In the Joint CLECs' view, this is an appropriate proceeding to address the terms and conditions with respect to an amendment for batch hot cuts. Because the Joint CLECs have proposed the only language for batch hot cuts, they argue that the Commission must adopt their proposed language and incorporate it into the amendment.

SBC argues that issues surrounding batch hot cut arrangements are already being addressed in Case No. U-14463. SBC points out that in the March 29, 2005 order in that case, the Commission directed that all filings and actions regarding hot cuts should be determined in Case No. U-14463. To interject hot cut issues into this proceeding, SBC argues, would be counterproductive, waste resources of the Commission and the parties, and would call into question the Commission's compliance with the *Batch Order*.

The Commission finds that it should not use this proceeding to make determinations concerning terms and conditions for batch hot cuts. Those issues are specifically relegated to being resolved in Case No. U-14463, which remains open for further mediations of hot cut issues. Therefore, the Commission adopts SBC's position on this issue and rejects the language proposed by the Joint CLECs on this issue.

Issue 29. Conversion Charges

This issue is resolved consistently with Issue 8 and 13. For the reasons stated in those issues, the Commission adopts the Joint CLECs' proposed language, and once again admonishes SBC concerning its charges.

Verizon Issues

On June 14, 2005, Verizon filed a submission concerning the joint disputed issues list. On June 24, 2005, replies to Verizon's submission were filed by TC3, TelNet, and XO. Thereafter, on June 30, 2005, Verizon filed a motion to strike the responses to its

submission. By July 15, 2005, TelNet and XO had filed responses to Verizon's motion.

In its motion to strike, Verizon states that it supplied its proposed *TRO* amendment on October 26, 2004. Thereafter, Verizon states, the Commission ordered the parties to produce *TRO* amendments through a collaborative process. It notes that in the Commission's May 17, 2005 order, the Commission adopted a schedule that provided for parties to file their disputed issues list by May 31, 2005. On June 14, 2005, the parties were to file support for their positions, and on June 24, 2005, the parties could file responses to the positions of other parties. Verizon argues that the only permissible filing on June 24 were responses to other parties' June 14 statements in support of their positions on previously identified disputed issues. Further, Verizon states, TC3, XO, and TelNet were all parties to the collaborative that designed the process adopted by the Commission.

Verizon states that on May 31, the collaborative members filed their joint disputed issues list, choosing to propose changes only to SBC's proposed *TRO* amendment. No issues were filed concerning Verizon's proposed amendment. Verizon states that the Commission Staff (Staff) and Verizon repeatedly questioned whether these CLECs had any issues with Verizon's *TRO* amendment, with no responsive identification of any issues.

Now, Verizon argues, after the collaborative process is over, these CLECs want to derail Verizon's amendment. Verizon argues that the June 24 filings by the three CLECs do not respond to any material about

any issue in the disputed issues list. As a result, Verizon argues, they must be stricken.

Verizon further states that TC3 correctly states that it is in the process of negotiating a *TRO* amendment with Verizon. However, Verizon states, TC3 omits the fact that Verizon has addressed TC3's desired change and that TC3 has simply not signed the revised amendment. Verizon suggests that perhaps TC3 wanted to stall to see if the collaborative process produced a better deal, but that explanation fails to identify any issue for the Commission to resolve.

Further, Verizon states, XO and TelNet argue that Verizon's amendment should not be adopted because Verizon never filed a baseline document. Verizon states that the argument makes no sense. Verizon affirms that it provided its proposed *TRO* amendment on October 26, 2004. The Commission order directing the filing of "a baseline document differentiating the language that has been agreed-upon, disputed language SBC proposes, and disputed language one or more of the [CLECs] want." May 17 order in Case No. U-14447, p. 3. Verizon asserts that before a baseline document can be created there must be issues or changes proposed to the amendment. However, Verizon states, there were no issues raised with respect to Verizon's proposed amendment, and thus, no baseline document needed to identify any disputes.

Verizon goes on to state that the reason XO opposes Verizon's amendment is the perception that it might affect negotiations in other states with Verizon affiliates. Verizon notes that XO raised no issues here

because it has no issues with Verizon's amendment in Michigan.

As to TelNet, Verizon argues, the CLEC's opposition relates to Case No. U-13931, its arbitration proceeding with Verizon. Verizon alleges that TelNet hoped that a different amendment might be worked out for Verizon by the parties to the collaborative, so that it could substitute it for the amendment it negotiated with Verizon. But the collaborative did not propose any changes to Verizon's amendment. It states that Verizon stood ready to work on any proposals the collaborative made, but none were offered.

Verizon further states that it should not be faulted for failing to propose changes to SBC's amendment. That amendment applies, by its terms only to interconnection agreements with SBC.

Finally, SBC argues, none of these CLECs identify any particular issue to be addressed by changes to the Verizon amendment. Verizon states that the consensus of the collaborative was that no changes were required to Verizon's amendment, and no disputed language issues were raised for Commission resolution. Verizon asks the Commission to confirm that the collaborative made no changes to Verizon's amendment and adopt it as the product of the collaborative. However, if the Commission is reluctant to do so, Verizon requests that the Commission should find that there is no Verizon amendment as a result of the collaborative and permit Verizon to continue negotiating with CLECs that may still require one.

XO responds that Verizon's motion to strike should be denied because the June 24 filings were responsive to Verizon's June 14 filing and properly bring to light important issues for the Commission's consideration.

TelNet argues that the Commission should deny the motion to strike. It states that Verizon's motion misleads the Commission to believe that the parties in the collaborative agreed that there would be one *TRO*/*TRRO* amendment for SBC and another one for Verizon. TelNet argues that the Commission should not strike the CLECs' filings on that erroneous premise, which is supported by neither the filings in Case No. U-14447 nor logic.

TelNet points out that Verizon's filing of an amendment on October 26, 2004, could not address the *TRRO*, which was not issued until February 4, 2005. TelNet states that in the Commission's March 29, 2005 order in Cases Nos. U-14303, U-14305, and U-14327, the Commission closed those dockets and directed interested parties to address the change of law resulting from the *TRO* and *TRRO* in the Case No. U-14447 collaborative. Case No. U-14327 was the docket in which Verizon filed its proposed October 24, 2004 amendment. Given the Commission's direction in the March 29 order for the parties to create four amendments from which to choose, TelNet states, there can be no illusion that Verizon's amendment remained on the table. According to TelNet, Verizon did not offer an amendment as part of that collaborative.

Moreover, TelNet argues, Verizon was a participant in the Joint Status Report filed on May 10, 2005, in which the parties to the collaborative requested a change in procedure to include submission of a joint disputed issues list, not one list for each ILEC. TelNet states that because SBC was the only ILEC that placed amendment language on the table, there is a reference to SBC's language in the request for change of procedure.

Further, TelNet asserts that there is no indication in the Commission's May 17, 2005 order that the Commission had been advised or intended that separate amendments would be approved for Verizon and SBC. TelNet argues that there is no reason that the amendment that results from the collaborative should not be applied to Verizon. TelNet reasons that the *TRO* and *TRRO* requirements are the same for both. It states that the CLEC participating in the collaborative have very divergent business plans, more divergent, TelNet argues, than the business plans of SBC and Verizon. TelNet argues that Verizon's "sandbagging and silence" should not be permitted to derail the efforts of the parties to the collaborative.

TelNet asserts that Verizon's assertion that the Staff and Verizon repeatedly asked if anyone had issues with Verizon's amendment, is an overstatement. TelNet asserts its belief that the limited discussion of Verizon's amendment occurred prior to the Commission's March 29, 2005 order in Cases Nos. U-14303, U-14305, and U-14327, in which the Commission clarified its intent that the collaborative parties should address the *TRRO* in addition to the *TRO*. TelNet goes on to state that Verizon did not urge

adoption of its October 26, 2004 proposed *TRO* amendment to the collaborative after March 29, 2005. From that point forward, TelNet states, the assumption was that the collaborative was addressing specific issues raised by the *TRO* and *TRRO*, and that these issues were not carrier specific. There were no issues raised specific to Verizon because there were no issues specific to Verizon. Rather, TelNet argues, the issues being raised in the collaborative were applicable to all ILECs and CLECs in the state. It states that the fact that SBC was the only ILEC commenting on these issues should not result in the *TRO* and *TRRO* issues being decided differently for Verizon.

Accordingly, TelNet argues, the Commission should not approve Verizon's outdated amendment that does not address the *TRRO*, but rather should apply the amendment that comes out of this collaborative to all ILECs and CLECs in the state.

TelNet states that although Verizon submitted its proposed amendment in a timely fashion for submission of a joint disputed issues list, the Commission should not deem that filing to be a request for approval, as the document itself did not expressly request such approval. Moreover, XO argues, Verizon never submitted its proposed amendment for consideration by the collaborative. During the collaborative sessions, XO states, Verizon never objected to language in the baseline amendment and never expressed disagreement with any of the language contained in that baseline agreement.

It appears to the Commission that, at best, there has been a fundamental misunderstanding between

Verizon and the CLECs. It appears that Verizon believed that the CLECs had no problem with Verizon's proposed amendment (its October 2004 version) and the CLECs believed that Verizon would be held to whatever the collaborative agreed to with SBC.

The Commission is not persuaded that it should impose on Verizon an amendment that was drafted with the relationship between the CLECs and SBC in mind. The language of the amendment approved today specifically refers to SBC providing facilities or billing customers, etc. Verizon is not mentioned in the amendment and the more generic term ILEC also was not used. Therefore, imposing the amendment approved for use with SBC's interconnection agreements on Verizon's interconnection agreements would present some problems.

However, the Commission is likewise unwilling to impose Verizon's proposed amendment on the CLECs who believed that they were negotiating in the collaborative for both agreements with both ILECs.

Therefore, the Commission finds that it should construct an abbreviated process for the parties to work out an amendment that can satisfy as nearly as possible, all concerned. The abbreviated process is justified because the Commission has now ruled on many issues related to the *TRO* and *TRRO*, which should make agreement easier. The Commission is not likely to reject what it has already approved or approve what it has already rejected. The Commission directs the parties to schedule collaborative meetings with the Director of the Commission's Telecommunications Division, Orjiakor Isiogu, to negotiate provisions to

bring their interconnection agreements into compliance with the requirements of the *TRO* and the *TRRO*. Those meetings should begin immediately. Within 60 days, the parties shall submit to the Commission either a joint application for approval of an amendment in the docket for their respective interconnection agreements, or a double red-lined version of an amendment, with supporting briefs and documentation. If the submission is the latter, the Commission will determine which of the competing language should be approved in baseball-style arbitration.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The interconnection agreements between SBC and the CLECs operating in Michigan should be amended as provided in this order.

c. Within 30 days of the date of this order, the parties shall submit fully executed copies of the amendment that complies with the findings of this order.

d. The parties should agree to and follow an orderly process for transition as described in this order.

e. Verizon should be permitted to negotiate with affected CLECs to come to an agreement on an appropriate amendment to their interconnection agreements pursuant to the process described in this order.

THEREFORE, IT IS ORDERED that:

A. Within 30 days of the date of this order, SBC Michigan shall submit to the Commission fully executed copies of the amendment that complies with the findings and conclusions of this order. The parties shall agree to and follow an orderly transition process, as provided in this order.

B. Within 60 days of the date of this order, Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems and TC3 Telecom, Inc., TelNet Worldwide, Inc., XO Communications Services, Inc., and any other competitive local exchange carrier that has an interconnection agreement with Verizon shall file a fully executed copy of an amendment for approval in the appropriate dockets or follow the alternative process outlined in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark Chairman
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of September 20, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

47 U.S.C. §§ 251(c)(2)-(3)

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting

carriers to combine such elements in order to provide such telecommunications service.

Triennial Review Remand Order (TRRO)
20 FCC Rcd 2609-12, ¶¶ 136-141

D. Entrance Facilities

136. In the Local Competition Order, the Commission defined dedicated transport as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers. n375

The Commission reaffirmed this definition, which encompassed entrance facilities (the transmission facilities that connect competitive LEC networks with incumbent LEC networks), in the UNE Remand Order. n376 In the Triennial Review Order, we revised the definition of dedicated transport to exclude entrance facilities. n377 We determined that entrance facilities "exist outside the incumbent LEC's local network" and should therefore -- given section 251's focus on competition within the local network -- be excluded from the definition of dedicated transport. n378 We also limited the definition of dedicated transport to "those transmission facilities connecting incumbent LEC switches and wire centers within a LATA." n379 Reviewing the Triennial Review Order, the USTA II court indicated that our exclusion of entrance facilities from the definition of dedicated transport was at odds

with the definition of "network element" found in section 153(29) of the Act. n380 Specifically, the court found that we erred in excluding these facilities from the definition of dedicated transport for purposes of implementing the section 251 unbundling obligation. n381 The court noted, moreover, that "if entrance facilities are correctly classified as 'network elements,' an analysis of impairment would presumably follow." n382

n375 *Local Competition Order*, 11 FCC Rcd at 15718, para. 440.

n376 *UNE Remand Order*, 15 FCC Rcd at 3842, paras. 322-23.

n377 *Triennial Review Order*, 18 FCC Rcd at 17203-04, para. 366. We also determined in the *Triennial Review Order* that our decision with respect to entrance facilities applied to transmission facilities connecting mobile wireless carriers' networks with incumbent LECs' networks, and that wireless carriers were therefore not entitled to unbundled access to these facilities. *Id.* at 17206, para. 368. Because we now conclude that wireless carriers may not obtain UNEs solely to provide mobile wireless service, we find it unnecessary to reconsider whether facilities linking wireless and incumbent LEC networks are properly considered entrance facilities. *See supra* para. 36.
n378 *Triennial Review Order*, 18 FCC Rcd at 17203-04, para. 366 (emphasis in original).

n379 *Id.* at 17202, para. 365.
n380 *USTA II*, 359 F.3d at 585-86; *see also* 47 U.S.C. § 153(29) (defining "network element" as "a facility or

equipment used in the provision of a telecommunications service").

n381 *USTA II*, 359 F.3d at 585-86. We do not interpret the court's decision to mean that we have no discretion to refine the statutory definition of "network element" for purposes of unbundling under section 251(c)(3). As we noted in the *Triennial Review Order*, the Act "does not provide guidance on which transmission facilities should be included in the definition of the transport network element." *Triennial Review Order*, 18 FCC Rcd at 17203, para. 366.

n382 *USTA II*, 359 F.3d at 585-86.

137. The USTA II court did not reject our conclusion that incumbent LECs need not unbundle entrance facilities, only the analysis through which we reached that conclusion. n383 In response to the court's remand, we reinstate the Local Competition Order definition of dedicated transport to the extent that it included entrance facilities, but we find that requesting carriers are not impaired without unbundled access to entrance facilities. n384

n383 In fact, the court expressed skepticism that incumbent LECs should be required to build entrance facilities under any circumstances. *Id.* at 586.

n384 We reject suggestions that we define entrance facilities as a new UNE, Alpheus Comments at 68-69, or as a member of the "loop" family, *id.* at 71; ATX, Bayring, *et al.* Reply at 48. Because the traffic aggregation potential inherent in entrance facilities more closely resembles that associated with dedicated

transport, we reject these arguments and consider these facilities to be a type of transport. In any event, the distinction has no practical significance, because our analysis here does not rely in any way on our treatment of other loop or transport elements. Several commenters have argued that we should revise the definition of dedicated transport to replace the references to a requesting carrier's "wire center" and "switch" with the term "location," to ensure that the definition does not exclude non-switched services, particularly data services. Alpheus Comments at 72-73; ATX, Blackfoot, *et al.* Comments at 48-49. Because these commenters have supplied no evidence that otherwise-qualified data service providers have been unable to obtain unbundled transport under the definition we re-adopt today, and because in any case we make a national finding of non-impairment with respect to entrance facilities, we reject this proposal.

138. As the court suggested, we now conduct an impairment analysis with respect to entrance facilities and find that the economic characteristics of entrance facilities that we discussed in the Triennial Review Order support a national finding of non-impairment. n385 Specifically, entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. As we noted in the Triennial Review Order, entrance facilities are used to transport traffic to a switch and often represent the point of greatest aggregation of traffic in a competitive LEC's network. n386 Because of this aggregation potential, entrance facilities are more likely than dedicated transport between incumbent LEC offices to carry enough traffic

to justify self-deployment by a competitive LEC. n387 Moreover, competitive LECs have a unique degree of control over the cost of entrance facilities, in contrast to other types of dedicated transport, because they can choose the location of their own switches. n388 For example, they can choose to locate their switches close to other competitors' switches, maximizing the ability to share costs and aggregate traffic, or close to transmission facilities deployed by other competitors, increasing the possibility of finding an alternative wholesale supply. n389 In addition, they often can locate their switches close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities. n390

n385 When the Commission last conducted an impairment analysis for entrance facilities, in the *UNE Remand Order*, the Commission concluded that competitive LECs were impaired without unbundled access to entrance facilities. *UNE Remand Order*, 15 FCC Rcd at 3851-52, paras. 347-48. The Commission found the record lacking in evidence that "the competitive entrance facility market is providing requesting carriers with effective alternatives to unbundled transport for all, or substantially all of the routes requesting carriers would need in order to provide the services they seek to offer." *Id.* at 3852, para. 348. At the same time, however, the Commission noted that "the entrance facility market appears to be the most mature segment of the interoffice transport market, and thus may, in some situations, provide requesting carriers with effective alternatives to unbundled transport for certain point-to-point routes." *Id.*

n386 *See Triennial Review Order*, 18 FCC Rcd at 17204-05, para. 367.

n387 *Id.* As described more fully below, the record contains evidence that competitive LECs are steadily deploying their own entrance facilities, or obtaining them from third-party providers, to replace entrance facilities formerly obtained from incumbent LECs. *See* Verizon Comments at 80-81; Verizon Comments, Attach. F, Declaration of Mohit Patel (Verizon Patel Decl.) at para. 15; BellSouth Comments at 54.

n388 *Triennial Review Order*, 18 FCC Rcd at 17204-05, para. 367.

n389 *Id.* at 17204-05, para. 367. The record contains evidence that competitive LECs are able to obtain entrance facilities from third-party providers. *See* NuVox Comments, Exh. A, Declaration of Keith Coker (NuVox Coker Decl.) at para. 3 ("Where available, NuVox utilizes third-party providers for backhaul from NuVox collocation arrangements to NuVox switches.")

n390 *Triennial Review Order*, 18 FCC Rcd at 17204-05, para. 367. The record indicates that entrance facilities tend to be much shorter in length than transport facilities between two incumbent LEC offices. AT&T Comments at 47-48, 52.

139. The record in this proceeding also demonstrates that competitive LECs are increasingly relying on competitively provided entrance facilities. BellSouth notes, for example, that between October 2003 and September 2004, 10 percent to 20 percent of the

entrance facilities it had provided to competitive LECs were replaced by facilities obtained from other sources. n391 Verizon states that between early 2003 and mid-2004, it migrated more than 32,000 entrance facility circuits to non-Verizon facilities. n392 No commenters in this proceeding have disputed this evidence, which indicates that wholesale alternatives to entrance facilities provided by incumbent LECs are widely available. And it appears that incumbent LECs and competitors alike continue to agree that entrance facilities are more competitively available than other types of dedicated transport. n393

n391 BellSouth Comments at 54 & BellSouth Padgett Aff. at para. 39.

n392 Verizon Comments at 81 & Verizon Patel Decl. at para. 15.

n393 *See, e.g.*, AT&T Comments at 52 (indicating that "almost all competitively deployed transport links are entrance facilities") (emphasis removed); Verizon Comments at 40-41; Verizon Comments, Attach. E, Declaration of Claudia P. Cuddy (Verizon Cuddy Decl.) at paras. 4-16 (describing Verizon's success in finding non-incumbent LEC providers of entrance facilities outside its region); *see also Triennial Review Order*, 18 FCC Rcd at 17205, para. 367 & n.1122.

140. We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. n394 Thus,

competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

n394 *Triennial Review Order*, 18 FCC Rcd at 17204, para. 366.

141. The evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities. n395 We also conclude that it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport. n396 As we have explained, entrance facilities are characterized by unique operational and economic characteristics that justify separate treatment: they are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. n397 For these reasons, we do not apply our test for other types of dedicated transport to entrance facilities.

n395 We find no justification in the record for making entrance facilities available on a transitional basis, as ALTS suggests, until carriers have achieved sufficient volumes to make self-deployment efficient. ALTS *et al.* Comments at 90. As we explained above, the record shows that self-deployment or alternative wholesale provisioning of entrance facilities are viable alternatives given the possibilities for traffic aggregation and efficient location of competitive LEC switches. These factors demonstrate that requesting carriers are able to enter the market on an economic basis without unbundled access to entrance facilities, and we therefore decline to require such unbundling.

n396 *See Triennial Review Order*, 18 FCC Rcd at 17204, para. 367 ("The economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction.") We thus reject commenters' suggestions that entrance facilities should be subject to the same test that applies to dedicated transport between incumbent LEC facilities. *See* AT&T Comments at 50-52; Loop-Transport Coalition Comments at 87; ATX, Bayring, *et al.* Reply at 48; McLeod Reply at 37.

n397 *See* AT&T Comments at 32 (noting that entrance facilities, compared to other transmission facilities, are better suited to self-deployment because they involve "enormous traffic" and "very short distances").

OPPOSITION BRIEF

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NOV 1 - 2010

Nos. 10-313 & 10-329

IN THE

Supreme Court of the United States

TALK AMERICA INC.

AND

ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND GREG R. WHITE, COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY D/B/A AT&T MICHIGAN, ET AL.,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether 47 U.S.C. § 251(c)(2) — which requires an incumbent local exchange carrier to provide interconnection "*for* the facilities and equipment *of* any [competing] carrier" at a point "*within* the [incumbent] carrier's network" (emphases added) — requires the incumbent to provide to a competing carrier, at extremely low regulated rates, all of the facilities and equipment that the competing carrier uses to span the distance (which may be miles) between its own network and the incumbent's network.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Michigan Bell Telephone Company d/b/a AT&T Michigan states the following:

Michigan Bell Telephone Company d/b/a AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc., which in turn is a wholly owned subsidiary of AT&T Inc., a publicly owned corporation. AT&T Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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Although the court below reached the correct decision, AT&T Michigan agrees with petitioners that review by this Court is warranted. The courts of appeals are intractably divided on a question involving one of the central provisions of the Telecommunications Act of 1996 ("1996 Act"), as to which the Federal Communications Commission ("FCC" or "Commission") has long recognized that there is a need for national uniformity. The Court should grant the petitions to resolve this division of authority and should affirm the Sixth Circuit's decision.[1]

STATEMENT

1. In the 1996 Act, Congress "fundamentally restructure[d] local telephone markets" and "subject[ed]" incumbent local exchange carriers ("incumbent LECs" or "ILECs"), like AT&T Michigan, "to a host of duties intended to facilitate market entry" by new providers of local telephone service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). "Foremost among these duties is the [incumbent] LEC's obligation . . . to share its network with competitors" by providing competing LECs ("CLECs") with leased access to "elements of the incumbent's network 'on an unbundled basis.'" *Id.* (quoting 47 U.S.C. § 251(c)(3)).

In its initial order implementing the 1996 Act, the FCC interpreted § 251(c)(3) to require incumbent LECs to "provide interoffice transmission facilities

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[1] With respect to No. 10-329, AT&T Michigan's acquiescence is limited to the first question presented, which also is the sole question presented in No. 10-313. The second question presented in No. 10-329 — whether the court below properly applied this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997) — does not independently warrant review. *See infra* Part D.

on an unbundled basis," including such facilities "between . . . the wire centers of incumbent LEC's and requesting carriers"; that is, competing LECs.[2] The FCC also interpreted 47 U.S.C. § 252(d)(1), which sets the pricing standard for unbundled network elements, to require incumbent LECs to lease such elements to competitors using a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent LEC's "historical investment" or the cost of the "actual network element being provided." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 501 (2002). The FCC termed this pricing methodology "TELRIC" or "total element long-run incremental cost." *Id.* at 495-96.

As a result of these two decisions, a competing LEC could pay TELRIC rates to lease from an incumbent LEC an "entrance facility," which is the "cable or wire used to transport calls from a CLEC switch to an ILEC switch." Pet. App.[3] 3a.[4] Those TELRIC

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 439-440 (1996) ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). 47 C.F.R. § 51.319(d)(1) (1996). "Wire centers are where . . . switches are located." *MCI WorldCom Communications, Inc. v. BellSouth Telecomms., Inc.*, 446 F.3d 1164, 1166 (11th Cir. 2006), *accord* 47 C.F.R. § 51.5. Switches are the "equipment [that] direct[s] calls to their destinations." *Iowa Utils. Bd.*, 525 U.S. at 371.

[3] References to "Pet. App." are to the appendix to the petition for certiorari filed by Talk America in No. 10-313.

[4] Petitioner Talk America (at 6) reproduces a diagram from the Ninth Circuit's opinion in *Pacific Bell Telephone Co. v. California Public Utilities Commission*, 597 F.3d 958, 964 (9th Cir.

rates were "well below the costs the ILECs had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*"). In addition, the rates were well below the tariffed rates at which incumbent LECs had long sold, and still sell, entrance facilities to other carriers. *See Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir. 2008).

2. The FCC's rules implementing the unbundling requirement in § 251(c)(3) did not fare well in the courts. In 1999, this Court vacated the Commission's initial unbundling rules, finding, among other things, that the FCC had erroneously read the 1996 Act to require "blanket access to incumbents' networks." *Iowa Utils. Bd.*, 525 U.S. at 390. In 2002, the D.C. Circuit vacated the FCC's second set of unbundling rules, in which the FCC — still improperly operating on the "belief that . . . more unbundling is better," *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*") — had repromulgated virtually all of the unbundling rules this Court

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2010), that depicts an entrance facility not as a wire running between competing LEC and incumbent LEC switches, but instead as a discrete piece of the incumbent's network that is adjacent to the incumbent's switch. The Ninth Circuit created that diagram out of whole cloth and with no support in the record before it; in fact, both parties in that case (AT&T California and the California Public Utilities Commission) provided the Ninth Circuit with diagrams depicting an entrance facility as a wire spanning the distance between an AT&T California switch and a competing LEC's switch. *See* Brief of Appellant AT&T California at 4, *Pacific Bell*, *supra* (Nos. 08-15568 & 08-15716), 2008 WL 3312433; Brief of Appellees California Public Utilities Commission and Commissioners at 7, *Pacific Bell*, *supra* (Nos. 08-15568 & 08-15716), 2008 WL 4205276.

had vacated, including the rule requiring incumbents to unbundle entrance facilities.[5]

In 2003, the FCC issued its third unbundling order (known as the *Triennial Review Order*[6]), in which it revisited (among other things) its prior determinations that § 251(c)(3) requires an incumbent LEC to unbundle the entrance facilities that connect an incumbent LEC's switch to a competing LEC's switch. Characterizing its prior approach as "overly broad" and "misguided," the FCC now concluded that entrance facilities — that is, "transmission links that simply connect a competing carrier's network to the incumbent LEC's network" — "exist *outside* the incumbent LEC's local network" and, therefore, are excluded as a matter of definition from the category of network elements that could be subject to unbundling. *TRO* ¶¶ 365-366. The FCC explained further that excluding entrance facilities from incumbents' unbundling requirements is "consistent with the Act" because competing LECs "have control over where to locate their network facilities to minimize self-deployment costs" and should "incorporate these costs . . . into their network deployment strategies rather than . . . rely[ing] exclusively on the incumbent LEC's network." *Id.* ¶ 367.

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[5] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 347-348 (1999) ("*UNE Remand Order*"), *vacated and remanded*, *USTA I*, *supra*; 47 C.F.R. § 51.319(d) (1999).

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *USTA II*, *supra*.

The D.C. Circuit rejected the FCC's conclusion that entrance facilities fall outside the category of "network elements" that could be "subject to the statutory unbundling requirement[] of § 251(c)(3)." *USTA II*, 359 F.3d at 585. The court, however, did not question the FCC's policy analysis, noting that competing LECs themselves depicted "entrance facilities" "as completely stand-alone items linking a CLEC switch with an ILEC office" that "appear[] [to] *exist* exclusively for the convenience of the CLECs." *Id.* at 586. The D.C. Circuit therefore found it "anomalous that CLECs do not themselves provide" their own entrance facilities. *Id.*

In 2005, the FCC issued its fourth unbundling order (known as the *Triennial Review Remand Order*), which responded to the D.C. Circuit's decision in *USTA II*. Applying the statutory "impairment" standard used to determine which elements incumbent LECs must unbundle pursuant to § 251(c)(3), *see Iowa Utils. Bd.*, 525 U.S. at 388-90, the FCC concluded that competing LECs are *not* impaired without unbundled access to entrance facilities: "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC" switches. *TRRO* ¶ 138.[8] Competing LECs can "choose to locate their

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[7] Order on Remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[8] The FCC continued to require incumbent LECs to unbundle much of the dedicated transport that connects two incumbent LEC switches. *See TRRO* ¶¶ 125-135.

switches" in order to "minimiz[e] the length and cost of entrance facilities" and to "increas[e] the possibility of finding an alternative wholesale suppl[ier]." *Id.* ¶ 138. The FCC therefore promulgated a rule stating that "incumbent LEC[s] [are] not obligated to provide . . . unbundled access" to entrance facilities. 47 C.F.R. § 51.319(e)(2)(i). Although various parties sought review of the FCC's 2005 order, none sought review of this rule.[9]

3. In the *Triennial Review Remand Order*, the FCC noted that many of its new unbundling rules would be implemented as incumbent and competing LECs made "changes to their interconnection agreements," *TRRO* ¶ 233, which are the contracts that are "Congress's chosen mechanism for increasing competition in the local telecommunications market," *Quick Communications, Inc. v. Michigan Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. 2008); *see Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Under the 1996 Act, disputes about the terms that should be included in interconnection agreements are presented in the first instance to state commissions, which must apply the provisions of the Act and the FCC's implementing rules. *See* 47 U.S.C. § 252(a)-(c).

In those proceedings before state commissions, competing LECs began to assert that incumbents were still required to provide entrance facilities at TELRIC rates, notwithstanding the FCC's new rule expressly excluding entrance facilities from incumbents' unbundling obligations under § 251(c)(3). These carriers argued that incumbent LECs' separate "duty

[9] The D.C. Circuit denied all of the petitions for review of the *Triennial Review Remand Order*. *See Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent LEC's] network," 47 U.S.C. § 251(c)(2), includes the obligation to provide entrance facilities to a competing LEC that uses those facilities to interconnect the two LECs' networks. These carriers argued further that, because the FCC had applied its TELRIC pricing methodology to both § 251(c)(3) and § 251(c)(2), the same TELRIC rates that the competing LECs had been paying for unbundled entrance facilities should continue to apply. Finally, these carriers claimed to find support for their argument in the FCC's statement in paragraph 140 of the *Triennial Review Remand Order* that the agency's finding that § 251(c)(3) does not require incumbents to unbundle entrance facilities "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."

A number of state commissions rejected competitors' attempt to preserve TELRIC-priced access to a type of facility that the FCC found had "unique operational and economic characteristics" that rendered "self-deployment" and "wholesale provisioning" "viable alternatives" to obtaining entrance facilities from incumbent LECs at TELRIC rates. *TRRO* ¶ 141 & n.395. For example, the Ohio commission found that § 251(c)(2) requires an incumbent to "interconnect its network with . . . facilities and equipment" that are "provided by the CLEC, not leased from the ILEC," at TELRIC rates.[10] Similarly, the Texas

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[10] Arbitration Award at 22-23, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 WL 3018712 (Ohio Pub. Utils. Comm'n

commission found that, although competing LECs would continue to "obtain interconnection facilities pursuant to" § 251(c)(2), "entrance facilities are not subject to TELRIC rates," "whether [used] for interconnection or for unbundled access to network elements."[11]

Other state commissions, including the Michigan and California commissions, accepted the competing LECs' contentions. Both of those commissions concluded that the FCC, in paragraph 140 of its *Triennial Review Remand Order*, made the "specific finding[]" that competing LECs "have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." Pet. App. 185a.[12] AT&T Michigan and AT&T California each sought review of

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Nov. 9, 2005), *available at* http://dis.puc.state.oh.us/TiffToPDf/LZAH5X8NU6JSB7R+.pdf.

[11] Arbitration Award – Track 1 Issues at 16, *Arbitration of Non Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, P.U.C. Docket No. 28821 (Tex. Pub. Util. Comm'n Feb. 23, 2005), *available at* http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/28821_520_470294.PDF.

[12] *See* Order Granting Limited Rehearing of Decision (D.) 06-01-043 on the Issue Regarding Rules on Fiber-to-the-Home (FTTH), Fiber to the Curb (FTTC) and Hybrid Loop, Modifying the Decision and Denying Rehearing, as Modified, in All Respects at 9, *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Application 05-07-024, Decision 07-01-019 (Cal. Pub. Utils. Comm'n Jan. 11, 2007) (holding that ¶ 140 "clearly refuted" AT&T California's argument that § 251(c)(2) does not require an incumbent LEC to provide a competing LEC with entrance facilities), *available at* http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/63687.pdf.

its respective commission's decision in federal district court.

4. The Michigan district court rejected the Michigan commission's conclusion, finding that it was "not reasonable" to interpret paragraph 140 of the *Triennial Review Remand Order* to require incumbent LECs to provide entrance facilities at TELRIC rates pursuant to § 251(c)(2). Pet. App. 158a. The court read the FCC's order to "convey[] [its] finding . . . that entrance facilities should be offered competitively," not at TELRIC rates. *Id.*

The Michigan commission and three competing LECs, including Talk America (petitioner in No. 10-313), appealed the district court's determination. The Sixth Circuit affirmed in a 2-1 decision.

The Sixth Circuit agreed with the district court that paragraph 140 of the *Triennial Review Remand Order* could not be read to impose on incumbent LECs the obligation to provide competing LECs with entrance facilities at TELRIC rates. Instead, the court found that the "most plausible" "plain reading" of paragraph 140 is that, "if [a competing LEC] build[s] [its] own entrance facility, the ILEC must still let [that carrier] hook it up to [the incumbent's] network (i.e., use its 'interconnection facility') at wholesale rates." *Id.* at 17a-18a. Therefore, the court below held that a competing LEC that "chooses to use [an] ILEC's entrance facility" — rather than "build its own entrance facility," "rent someone else's," or "connect directly" to the incumbent LEC, without using an entrance facility — "must pay the rates determined by the ILEC" in its tariff, not regulated TELRIC rates. *Id.* at 32a.

Thus, as the Sixth Circuit explained by way of an analogy to extension cords and electrical outlets, *see*

id. at 18a-21a, there is a critical difference between entrance facilities and the "interconnection facilities" that incumbents provide to comply with § 251(c)(2). The former span the entire distance between a competing LEC's switch and an incumbent LEC's switch, which may "be very long," "even miles," if the competing LEC has elected to locate its switch far from the incumbent's. *Id.* at 3a. An interconnection facility, in contrast, is the equipment within the incumbent LEC's network to which the competing LEC's entrance facility connects; that equipment may be a port on a frame connected to the incumbent's switch or a cross connect cable attached to that frame (rough equivalents of the "wall outlet" and "surge protector" in the court's analogy). *Id.* at 19a-20a.

The Sixth Circuit rejected the Michigan commission's contrary reading of paragraph 140, holding that this interpretation "require[d] several assumptions, none of which is easily defended." *Id.* at 24a. In particular, the Michigan commission's interpretation presumed that the FCC had "used two separate terms" in paragraph 140 — "'entrance facility' and 'interconnection facility' — to describe the exact same wire, without any explanation why." *Id.*[13] Furthermore, that interpretation was based on an "unnatural reading" of the "phrase 'provide . . . interconnection *with* the [ILEC]'s network'" in § 251(c)(2) that had "no support in the statute." *Id.* at 28a (quoting 47 U.S.C. § 251(c)(2)) (omission and alteration in

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[13] The Sixth Circuit also noted that the Michigan commission's position would require the court to adopt definitions of the terms "entrance facility" and "interconnection facility" that the FCC had never adopted and that, in the case of "interconnection facility," the FCC and courts had rejected. *See* Pet. App. 25a-28a.

original). The better reading of that statutory phrase, the court found, was that "the ILEC is obligated" to "'make a plug-in available' *for* connection with the CLEC's facilities and equipment," not "to 'lease a physical facility (or wire)' *to* the CLEC." *Id.*

The Sixth Circuit acknowledged that its holding conflicted with decisions of the Seventh and Eighth Circuits, which had held that, when the FCC referred in paragraph 140 of the *Triennial Review Remand Order* to the "right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2)," the agency actually "said . . . that ILECs must allow use of *entrance facilities* for interconnection" at TELRIC rates. *Illinois Bell*, 526 F.3d at 1072 (emphases added); *see Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-84 (8th Cir. 2008) (following *Illinois Bell*).[14] The court below did "not find th[o]se two cases persuasive," because those two courts' "'reasoning' is entirely circular" as each "assum[ed] the very question to be decided": namely, that "interconnection facilities" and "entrance facilities" are the same thing. Pet. App. 28a-31a.

The Sixth Circuit also refused to defer to the position of the FCC in an *amicus* brief, finding that the FCC's position "is so plainly erroneous" that it could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of inter-

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[14] This Court denied the Missouri Public Service Commission's petition for certiorari seeking review of a different decision that the Eighth Circuit reached in *Southwestern Bell*. *See Missouri Pub. Serv. Comm'n v. Southwestern Bell Tel., L.P.*, 129 S. Ct. 971 (2009).

preting the regulation." *Id.* at 9a-10a n.6.[15] In that *amicus* brief, the FCC urged the Sixth Circuit to reverse the district court, asserting that the district court had improperly treated the "FCC's statement in paragraph 140" as "a mere 'explanatory comment' without legal force." *Id.* at 129a & n.32. But the FCC conceded in its brief that, while paragraph 140 stated that the FCC's decision not to require incumbents to unbundle entrance facilities "'does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2),'" *id.* at 125a (quoting *TRRO* ¶ 140), the FCC "did not specifically define what it meant by the term 'interconnection facilities,'" *id.* at 137a-138a. The FCC asserted only that the Michigan commission's "interpretation" of the term "interconnection facilities" "to include entrance facilities" was "fully consistent" with the agency's order. *Id.* at 138a.

5. Nine days after the court below ruled, the Ninth Circuit issued its decision in *Pacific Bell*. AT&T California had appealed a federal district court decision upholding the California commission's conclusion that, in paragraph 140, the FCC had "[c]learly . . . established" that incumbent LECs must lease entrance facilities to competing LECs at TELRIC rates. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, No. C 07-1797 SI, 2008 WL 501390, at *7 (N.D. Cal. Feb. 21, 2008) (internal quotation marks omitted; alteration in original). The Ninth Circuit affirmed that decision, stating that it "agree[d] with our sister circuits" — that is, the Seventh and Eighth Circuits — "that FCC regulations authorize state public utilities commissions to

[15] The panel requested the FCC's views following the December 10, 2008 oral argument. *See* Pet. App. 120a & n.1.

order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection." 597 F.3d at 965.

In reaching that decision, the Ninth Circuit did not address, or acknowledge the existence of, the Sixth Circuit's contrary decision, even though AT&T California brought that decision to the Ninth Circuit's attention on February 25, 2010 (one week before the Ninth Circuit issued its opinion). Nor did the Ninth Circuit mention — let alone defer to — the *amicus* brief that the FCC had filed with the Sixth Circuit, which the California commission had provided to the Ninth Circuit on May 18, 2009.

6. The Michigan commission and the competing LEC appellants sought rehearing of the Sixth Circuit's decision. The FCC took the unusual step of filing an *amicus* brief in support of those petitions for rehearing, in which it "inform[ed] the [Sixth Circuit] that the FCC continues to stand behind the interpretation and arguments set forth in its April 2009 *amicus* brief."[16] The Sixth Circuit sought a response to the petitions for rehearing but, on June 2, 2010, denied those petitions. *See* Pet. App. 90a-91a. The Michigan commission and Talk America filed petitions for a writ of certiorari on August 31, 2010.

The next day, the Ninth Circuit ruled on AT&T California's petition for rehearing of that court's decision in *Pacific Bell*. That court denied rehearing, but amended its opinion to state that the court

[16] Brief for *Amicus Curiae* Federal Communications Commission in Support of Petitions for Rehearing and/or Rehearing *En Banc* at 3, *Michigan Bell Tel. Co. v. Covad Communications Co.*, Nos. 07-2469 & 07-2473 (6th Cir. filed Mar. 18, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296968A1.pdf.

"agree[s] with the Seventh and Eighth Circuits and reject[s] the reasoning advanced by AT&T [California] and the Sixth Circuit in its recent 2-1 decision." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, Nos. 08-15568 & 08-15716, 2010 WL 3421187, at *5 (9th Cir. Sept. 1, 2010) (to be reported at --- F.3d ---).

ARGUMENT

The court of appeals below correctly held that incumbent LEC's have no obligation under § 251(c)(2) to provide TELRIC-priced entrance facilities to competing LEC's and that a competing LEC purchasing an entrance facility from an incumbent — rather than "build[ing] its own entrance facility," "rent[ing] someone else's," or "connect[ing] directly" without using an entrance facility — instead must pay the incumbent LEC's tariffed rates. Pet. App. 32a.

AT&T Michigan agrees with petitioners, however, that review by this Court is warranted, because this case presents a recurring question of substantial importance on which there is a direct and acknowledged conflict among four courts of appeals. Although AT&T California intends to petition for certiorari from the Ninth Circuit's conflicting decision in *Pacific Bell*, this case presents an appropriate vehicle for resolution of this question.[17] Review by this Court to resolve this division of authority therefore would be appropriate.[18]

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[17] AT&T California's petition for certiorari is currently due on November 30, 2010. AT&T California anticipates asking this Court to hold its petition pending the outcome of these petitions, which raise the same issue in an identical procedural posture.

[18] AT&T Michigan's acquiescence is limited to the first question presented by the Michigan commission (petitioner in No. 10-329), which also is the sole question presented by Talk

A. Review Is Warranted To Resolve the Acknowledged and Mature Conflict Between the Sixth, Seventh, Eighth, and Ninth Circuits

Petitioners are correct that the courts of appeals disagree about whether the interconnection duty in § 251(c)(2) requires incumbent LECs to provide competing LECs with TELRIC-priced entrance facilities, which span the entire distance between a competing LEC's switch and an incumbent LEC's switch. *See* MPSC Pet. 14-16; Talk America Pet. 19-20.

The court below extensively reviewed — and expressly rejected as "not . . . persuasive" and "entirely circular" — the decisions of the Seventh and Eighth Circuits that had upheld state commission decisions requiring incumbent LECs to provide TELRIC-priced entrance facilities under § 251(c)(2). Pet. App. 28a-31a (discussing *Illinois Bell* and *Southwestern Bell*). The Sixth Circuit, moreover, reached precisely the opposite conclusion from the Seventh and Eighth Circuits on the question of incumbent LEC's obligations under § 251(c)(2) in the context of entrance facilities.

The Ninth Circuit then deepened the circuit conflict when it "agree[d] with" the Seventh and Eighth Circuits "that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection." *Pacif-*

America (petitioner in No. 10-313). The second question the Michigan commission presents — whether the court below properly applied this Court's decision in *Auer* — does not independently warrant review, as the court below properly stated the rule in *Auer* and its decision does not conflict with the decision of any other court. *See infra* Part D.

ic Bell, 597 F.3d at 965. Although the Ninth Circuit's opinion did not acknowledge the existence of the Sixth Circuit's contrary decision, the Ninth Circuit's decision on rehearing (issued the day after these petitions were filed) leaves no doubt of its view that the Sixth Circuit erred and that the Seventh and Eighth Circuits reached the correct decision. As explained above, that court amended its initial decision to state expressly that it "agree[s] with the Seventh and Eighth Circuits and reject[s] the reasoning advanced by . . . the Sixth Circuit in its recent 2-1 decision." *Pacific Bell*, 2010 WL 3421187, at *5.

Over the course of two years, four courts of appeals have addressed the issue, and the result is a square and acknowledged conflict among them. The conflict thus is fully developed without any realistic prospect of it being resolved by further litigation in the lower courts or by pending FCC action. Indeed, the Sixth Circuit and the Ninth Circuit each denied rehearing in its respective case, making it exceedingly unlikely that the circuit conflict will be resolved without this Court's intervention. The timing of the decision below and the directly conflicting decision from the Ninth Circuit nine days later underscores that the time is ripe for this Court to resolve the conflict and to bring much needed clarity to this significant issue of telecommunications law.

In addition, this case is an appropriate vehicle for resolving the question presented. The issue is squarely presented. There are no preliminary or threshold issues, and the essential facts are undisputed. Nor is there any alternative ground on which to affirm the decision below.

B. The Circuit Conflict Involves a Recurring Issue of Great Practical Importance

Petitioners also are correct that the issue raised by this case is of broad national importance, because it involves a key provision of the 1996 Act and affects the terms on which AT&T Michigan and other incumbent LECs must interconnect with numerous other carriers.

1. The FCC has long recognized the need for national, uniform rules regarding the obligations that § 251(c) imposes on incumbent LECs. *See Local Competition Order* ¶¶ 54, 56, 60. When it first promulgated rules to implement the 1996 Act, the FCC specifically "conclude[d] that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone exchange market." *Id.* ¶ 179. In defending its authority to promulgate national rules before this Court, the government likewise stressed the need for "nationally consistent interpretations of the Act's key provisions," explaining that "Congress did not leave room for each of 50 state commissions to disagree about the basic federal issues that arise under the 1996 Act." Opening Brief for the Federal Petitioners at 16, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (No. 97-831), *available at* http://www.justice.gov/osg/briefs/1997/3mer/2mer/97-0831.mer.pdf; *see id.* at 17 (urging deference to its "expert determination that the absence of a national framework would impair effective implementation of the 1996 Act").

The FCC also recognized the importance of the specific issue presented here, when it filed an uninvited *amicus* brief in support of the petitions for

rehearing of the Sixth Circuit's decision. *See supra* p. 1. This action not only appears to be unprecedented,[19] but also stands in stark contrast to the FCC's inaction in another recent case. In *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009), the Eighth Circuit held that the Nebraska commission was preempted from requiring VoIP providers (such as Vonage) to contribute to the state's Universal Service Fund, despite the FCC's contention in its *amicus* brief (filed without a request from the court) that the Eighth Circuit should reject Vonage's preemption claim.[20] Although the Nebraska commission sought rehearing, the FCC did not file an *amicus* brief in support of that petition.

2. The question presented is frequently litigated and warrants this Court's immediate resolution.

Entrance facilities are a common means of achieving interconnection with an incumbent LEC. AT&T Michigan and its incumbent LEC affiliates provide more than 15,000 entrance facility interconnection arrangements nationwide to competing LECs and wireless carriers today.[21] Unsurprisingly, disputes

[19] A review of the FCC's online archive of court filings, *see* http://www.fcc.gov/ogc/archivedfilings.html, as well as of publicly available online databases, reveals no other uninvited *amicus* filings by the FCC in support of a petition for rehearing.

[20] *See* Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal at 14, *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009) (No. 08-1764), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284738A1.pdf.

[21] Although wireless carriers are not entitled to lease TELRIC-priced unbundled network elements under § 251(c)(3), *see TRRO* ¶ 34, the FCC has long permitted wireless carriers to

about the price that incumbent LECs may charge for entrance facilities — whether they may charge tariffed rates set under the traditional just-and-reasonable standard or must charge far lower rates set under the FCC's TELRIC methodology — remain the subject of active litigation between incumbent LECs and both competing LECs and wireless carriers. For example, the Colorado and Oregon commissions weighed in for the first time on this issue in 2008, reaching opposite results.[22] And affiliates of AT&T Michigan have pending litigation raising this question before state commissions in a number of circuits, including the Fourth, Fifth, and Eleventh Circuits. Unless this Court resolves the question, the state commissions will be forced to navigate the division of authority in the courts of appeals as they attempt to fulfill their obligation to rule in accordance with "the requirements of section 251." 47 U.S.C. § 252(c)(1).

In addition, the issue is important and urgent. In upholding the FCC's TELRIC-pricing methodology, this Court recognized that TELRIC rates were

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benefit from incumbent LEC's interconnection obligations under § 251(c)(2), *see Local Competition Order* ¶ 1015.

[22] *See* Order Addressing Applications for Rehearing, Reargument, or Reconsideration at 5-8, *Sprint Communications Company L.P.'s Petition for Arbitration with CenturyTel of Eagle, Inc. Pursuant to § 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 08S-121T, Decision No. C08-1218, 2008 WL 5158834 (Colo. Pub. Utils. Comm'n Nov. 20, 2008) (Issue 5); Order at 5-7, *Sprint Communications Company L.P. Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc.*, ARB 830, Order No. 08-486, 2008 WL 4493108 (Or. Pub. Util. Comm'n Sept. 30, 2008) (Issue 6), *vacated in part on other grounds on recon.*, ARB 830, Order No. 09-109, 2009 WL 904645 (Or. Pub. Utils. Comm'n Mar. 31, 2009).

limited to "bottleneck elements." *See, e.g.*, *Verizon*, 535 U.S. at 510 & n.27, 515-17; *see also Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609-10 (7th Cir. 2008) (Posner, J.) (explaining that unbundling is intended only for "bottleneck facilities"). There are well-recognized competitive harms that flow from mandating TELRIC pricing of non-bottleneck facilities. Requiring incumbent LECs to sell such facilities at below-market TELRIC rates "reduce[s] or eliminate[s] the incentive . . . for a CLEC" to self-deploy entrance facilities, "because it can get the element cheaper" from the incumbent. *USTA I*, 290 F.3d at 424. The FCC likewise has recognized that TELRIC pricing "create[s] disincentives for . . . competitive LECs to deploy . . . facilities." *TRRO* ¶ 36.[13]

Here, there can be no serious claim that entrance facilities are bottleneck elements. the FCC found in 2005 not only that entrance facilities have "unique operational and economic characteristics" that render "self-deployment" and "alternative wholesale supply" possible, but also that it was undisputed that competing LECs were in fact "increasingly relying on competitively provided entrance facilities," which "are widely available." *Id.* ¶¶ 138-139, 141. Requiring incumbents to provide entrance facilities at TELRIC rates thus contradicts the purpose of the 1996 Act, which was not "to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate," but instead "to stimulate competition — preferably genuine,

[13] *See TRRO* ¶ 218 (TELRIC pricing for non-bottleneck elements can "seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition"); *see also TRO* ¶ 656 (TELRIC pricing for non-bottleneck elements is "no[t] necessary to protect the public interest").

facilities-based competition." *USTA II*, 359 F.3d at 576; *see Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in relevant part) ("It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.").

C. The Decision Below Is Correct and Should Be Affirmed

The Sixth Circuit correctly held that § 251(c)(2) does not require incumbent LECs to provide TELRIC-priced entrance facilities to competing LECs.

1. Section 251(c)(2) requires an incumbent LEC, such as AT&T Michigan, "to provide, *for* the facilities and equipment *of* any requesting telecommunications carrier, interconnection with the local exchange carrier's network" at a "point *within* the [incumbent LEC's] network." 47 U.S.C. § 251(c)(2)(B) (emphases added). It is plain that the only "facilities and equipment" to which § 251(c)(2) refers belong to the requesting carrier,[24] not to the incumbent LEC, and the incumbent's duty is to "provide . . . interconnection" "for" the other carrier's facilities and equipment. Moreover, that interconnection is to occur at a point "within" the incumbent LEC's network, not by the incumbent LEC providing facilities that reach all the way to the competing LEC's switch, which is a point on the competing LEC's network.

The "[]natural reading" of the statute, as the Sixth Circuit found, is that an incumbent LEC must provide a place within its network for a competing LEC

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[24] The "requesting telecommunications carrier" is a competing LEC or other carrier (including wireless carriers) seeking to provide local telephone service in competition with the incumbent LEC. *See Local Competition Order* ¶¶ 190-191, 1015.

to "plug-in" its own facilities and equipment, and that the incumbent need not "'lease a physical facility (or wire)' *to* the CLEC" — that is, an entrance facility — to span the distance between the two carriers' networks. Pet. App. 28a.

That reading is supported by § 252(d)(1), which is the pricing provision that applies to both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3). With respect to the unbundling duty, § 252(d)(1) applies to the "rate for [the] network elements" that incumbent LECs must lease to competitors. 47 U.S.C. § 252(d)(1). In contrast, with respect to the interconnection duty, § 252(d)(1) applies to the "rate for the interconnection *of* facilities and equipment." *Id.* (emphasis added). If Congress had meant for § 251(c)(2) to require incumbent LECs to lease facilities and equipment to other carriers, as § 251(c)(3) requires, it would instead have established a pricing standard "for the facilities and equipment used for interconnection," just as it established one "for the network elements" that must be unbundled. But that is not what Congress did.

2. The FCC's orders and regulations interpreting and implementing the 1996 Act further support this reading of § 251(c)(2). In its first order implementing the Act, the FCC distinguished the interconnection duty in § 251(c)(2) from the unbundling duty in § 251(c)(3). The former duty allows competing LECs "to choose the most efficient points at which to exchange traffic with incumbent LECs," while it is the latter that "permits new entrants . . . to substitute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete." *Local Competition Order* ¶ 172.

Although the FCC has interpreted § 251(c)(2) to require incumbents, "at least to some extent, to adapt their facilities to interconnection . . . by other carriers" — as incumbent's networks "were not designed to accommodate third-party interconnection," *id.* ¶ 202 — the FCC has never found those required accommodations to include leasing to a competing LEC the entire facility spanning the distance between the two networks.[25] Instead, the only FCC regulations that ever required incumbents to provide entrance facilities to competitors were promulgated to implement the separate unbundling duty in § 251(c)(3).[26] The FCC's long-standing interconnection regulations, in contrast, simply identify the various "point[s] within the incumbent LEC's network" where interconnection may occur. 47 C.F.R. § 51.305(a)(2)(i)-(vi); *see also id.* § 51.321(b)(1).[27]

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[25] The furthest the FCC ever stretched the obligation to accommodate interconnection was to require incumbent LECs to enter into "meet point arrangements," where both the incumbent and the competing LEC each "pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553; *see* 47 C.F.R. § 51.321(b)(2) (codifying the meet-point obligation). The FCC stressed that meet-point arrangements would require incumbent LECs to engage in only "some," "limited build-out of facilities" as an "accommodation of interconnection," while requiring "each party to bear a reasonable portion of the economic costs of the arrangement." *Local Competition Order* ¶ 553.

[26] *See Local Competition Order* ¶¶ 439-440; 47 C.F.R. § 51.319(d)(1) (1996); *UNE Remand Order* ¶¶ 347-348; 47 C.F.R. § 51.319(d) (1999).

[27] The term "interconnection facility" appears only once in the FCC's regulations implementing § 251(c)(2). *See* 47 C.F.R. § 51.305(a)(3) ("requir[ing] an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network").

3. None of the three circuits to reach the opposite result sought to square their ruling with the text of § 251(c)(2). Nor do petitioners here do so. Instead, they rely on paragraph 140 of the *Triennial Review Remand Order*, claiming that the FCC there "explicitly recognized" that incumbents must provide competing LECs with TELRIC-priced entrance facilities. MPSC Pet. 9-10; *accord* Talk America Pet. 25. In fact, as the Sixth Circuit held, paragraph 140 "actually says no such thing." Pet. App. 30a. Instead, the FCC there stated only that § 251(c)(2) requires incumbent LECs to provide "interconnection facilities," which is a term that the FCC conceded in its *amicus* brief that it "did not specifically define." *Id.* at 138a. Petitioners thus err in claiming that the FCC has defined "interconnection facility" so broadly that it encompasses any (and every) incumbent-LEC-owned facility that a competing LEC could use in order to interconnect its network to the incumbent's. *See* Talk America Pet. 25; MPSC Pet. 13. Instead, as discussed above, an interconnection facility is the equipment within the incumbent LEC's network to which a competing LEC attaches its own facilities and equipment.

Moreover, in paragraph 140, the FCC stated only that its decision not to require incumbent LECs to provide entrance facilities as unbundled network elements under § 251(c)(3) "does not alter" competing LECs' "right[s]" under § 251(c)(2). *TRRO* ¶ 140. Therefore, paragraph 140 cannot be read to create a new right, but simply refers back to any pre-existing rights under § 251(c)(2). Yet no prior FCC order or regulation, or other source of legal authority, had found in § 251(c)(2) a right for competing LECs

to demand TELRIC-priced entrance facilities from incumbent LECs.[28]

Finally, as the court below concluded, the claim that paragraph 140 established a new obligation on incumbent LECs cannot be squared with the surrounding paragraphs of the FCC's order. *See* Pet. App. 17a-18a. The FCC noted in paragraph 140 that § 251(c)(2) means that competing LECs "will have access to these [interconnection] facilities at

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[28] Petitioners rely on the FCC's discussion in the *Triennial Review Order* regarding competing LECs' prior use of entrance facilities obtained as unbundled network elements under § 251(c)(3) for so-called "backhauling." *See* MPSC Pet. 8, 11; Talk America Pet. 5-9. However, that discussion was not repeated in the *Triennial Review Remand Order* and has no relevance here, as the Sixth Circuit found. *See* Pet. App. 25a n.13. Nonetheless, AT&T Michigan notes that the Seventh, Eighth, and Ninth Circuits all operated under a misunderstanding of "backhauling." "Backhauling" describes a competing LEC's use of an entrance facility to connect its own switch to a loop (the wire connecting a customer premises to a switch) that the competing LEC obtained from an incumbent LEC as an unbundled element under § 251(c)(3); the competing LEC then uses its switch to provide telephone service to the customer connected to the unbundled loop. *See, e.g.*, *TRO* ¶ 480 ("[t]he need to backhaul the circuit [*i.e.*, the loop] derives from the [competing LEC's] use of a switch located in a location relatively far from the end user's premises"). Traffic "backhauled" to the competing LEC switch over that unbundled entrance facility might then be routed from the switch to other customers of the competing LEC, but it also might be routed to customers of an incumbent LEC or a third-party carrier. The Seventh, Eighth, and Ninth Circuits thus were wrong to define "backhauling" as limited to "mov[ing] . . . traffic among CLEC customers." *Illinois Bell*, 526 F.3d at 1071; *see Southwestern Bell*, 530 F.3d at 681 (describing backhauling as "CLEC to CLEC traffic"); Pet. App. 53a (describing backhauling as a competing LEC "us[ing] the entrance facility to permit its *own* customers to reach *one another* over the incumbent LEC[']s network").

[TELRIC] rates *to the extent that they require them* to interconnect with the incumbent LEC's network." *TRRO* ¶ 140 (emphasis added). In the surrounding paragraphs, however, the FCC established that competing LECs do *not* require TELRIC-priced entrance facilities, which have "unique operational and economic characteristics" that both "justify self-deployment" and explain the widespread availability of "competitively provided entrance facilities." *Id.* ¶¶ 138-139, 141. This is yet another reason why the Sixth Circuit correctly rejected petitioners' attempt to equate "interconnection facilities" with "entrance facilities."[29]

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[29] Talk America takes issue (at 22, 26, 29) with various statements in footnotes in the decision below, rather than grappling with the centerpiece of the Sixth Circuit's reasoning: namely, its rejection of Talk America's "unnatural reading" of § 251(c)(2) and paragraph 140 of the *Triennial Review Remand Order*. Pet. App. 24a-28a. Talk America's challenges to the periphery of the Sixth Circuit's opinion lack merit and, in all events, provide no basis for rejecting the Sixth Circuit's core conclusions. In particular, Talk America is wrong to rely (at 23) on a paragraph of an FCC Staff order stating, in passing, that certain "'entrance facilities' are interconnection facilities." Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act of 1934 for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶ 58 (Chief, Wireline Comp. Bur. 2002). The facilities at issue there were ones the competitive LEC proposed to sell to the incumbent LEC. *See id.* As the FCC Staff recognized, § 251(c)(2) does not govern those facilities. *See id.* ¶ 71 n.200. Moreover, when the FCC Staff addressed the entrance facilities that the incumbent LEC would sell to the competing LEC — that is, the very same facilities at issue here — it grounded its analysis entirely in § 251(c)(3) and the FCC's then-effective unbundling regulations, without describing the entrance facilities as "interconnection facilities" or suggesting

D. Whether the Court Below Properly Applied *Auer* Does Not Independently Warrant Review

The Michigan commission — but not Talk America — presents as an independent question for review whether the court below erred in refusing to defer to the FCC's position in its *amicus* brief, which the Michigan commission claims conflicts with the Ninth Circuit's decision in *Pacific Bell*. Unlike the question of the proper construction of incumbent LEC's obligations under § 251(c)(2), on which there is a clear and acknowledged conflict among the circuits, the Sixth Circuit's application of this Court's decision in *Auer* does not conflict with any other circuit's decision. Instead, the Michigan commission's second question simply raises a claim for error correction, which does not independently warrant review. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").[30]

The court below correctly stated the rule applied in *Auer*: that "a federal agency's interpretation of its own ambiguous regulation — even an interpretation presented in an amicus brief — is 'controlling unless plainly erroneous or inconsistent with the regulation.'" Pet. App. 8a n.6 (quoting *Auer*, 519 U.S. at 461). The court found the FCC's position in its

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that § 251(c)(2) independently required the same result. *See id.* ¶¶ 210-217.

[30] Limiting the grant of the Michigan commission's petition to the first question will not affect the Court's ability to consider what deference, if any, to give to the position set out in the *amicus* brief on the merits that the FCC likely will file with this Court.

amicus brief here to be "so plainly erroneous or inconsistent with the regulation" that it "decline[d] . . . to apply *Auer* deference" to that position. *Id.* at 10a n.6. The lower court's ruling is correct and is consistent with this Court's own refusal to defer to an agency's unreasonable interpretation of a regulation. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (finding that "*Auer* deference is unwarranted" where the agency's interpretation conflicted with "the regulation's obvious meaning"). Courts of appeals routinely refuse to defer to agency interpretations under *Auer* (or, more generally, under the *Seminole Rock* line of authority) where the agency's interpretation is "plainly erroneous or inconsistent with the regulation."[31]

The Michigan commission, however, claims (at 4) that the decision below conflicts with the Ninth Circuit's decision in *Pacific Bell*, in which that court purportedly "afforded [*Auer*] deference to the FCC's interpretation when examining the identical issue."[32] In fact, the Ninth Circuit did not address the question whether the FCC's *amicus* brief warranted *Auer* deference. The Ninth Circuit did not discuss that *amicus* brief at all, even though the California commission had relied on the FCC's brief in defending its decision on appeal. As a result, the Ninth Circuit's decision cannot conflict with the Sixth Circuit's re-

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[31] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see, e.g., City of Cleveland v. Ohio*, 508 F.3d 827, 847 (6th Cir. 2007); *Duchek v. NTSB*, 364 F.3d 311, 314 (D.C. Cir. 2004) (Roberts, J.); *Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166-67 (9th Cir. 2003); *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003).

[32] Although Talk America (at 30-31) criticizes the Sixth Circuit's treatment of the FCC's *amicus* brief, it makes no claim of a circuit conflict.

fusal to defer under *Auer* to the FCC's position in its *amicus* brief.

Furthermore, to the extent the Ninth Circuit discussed *Auer*, it did so only with respect to the FCC's 2003 *Triennial Review Order*, which the Ninth Circuit believed contained a "reasonable" interpretation of the FCC's 1996 *Local Competition Order* that supported the court's ruling. *Pacific Bell*, 597 F.3d at 968. However, no party before the Sixth Circuit — including the FCC as *amicus curiae* — advanced this claim about the *Triennial Review Order*, much less urged that court to defer to the FCC's supposed interpretation of its 1996 order. The FCC itself discussed its *Triennial Review Order* in only two short passages of its *amicus* brief, in which it described that order as preserving a pre-existing obligation to make "interconnection facilities" or "facilities" — not "entrance facilities" — available at TELRIC rates. *See* Pet. App. 137a, 138a.[33] The FCC's *amicus* brief thus confirms that it is the Ninth Circuit that erred in its application of *Auer*, by deferring to a reading of the *Triennial Review Order* different from the agency's own.

CONCLUSION

The petitions for a writ of certiorari in No. 10-313 and No. 10-329 (limited to Question 1) should be granted.

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[33] Consistent with this aspect of the FCC's position in its *amicus* brief, the court below read the *Triennial Review Order* as treating "interconnection facilities and entrance facilities [as] different things," with only interconnection facilities required to be provided at TELRIC rates. Pet. App. 27a n.13. The Seventh and Eighth Circuits, in reaching the same result as the Ninth Circuit, did not cite the *Triennial Review Order*.

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REPLY BRIEF

(3)

Supreme Court, U.S.
FILED
NOV 15 2010
OFFICE OF THE CLERK

No. 10-329

In The

Supreme Court of the United States

Orjiakor N. Isiogu, Monica Martinez, and Greg R. White, Commissioners of the Michigan Public Service Commission,

Petitioners,

v.

Michigan Bell Telephone Company, d/b/a AT&T Michigan,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

Respondent's brief in opposition confirms Petitioners' assertion that the Sixth Circuit's decision warrants this Court's review because it involves jurisprudentially-significant federal questions concerning the Telecommunications Act of 1996 (the Act). Respondent disputes Petitioners' claim that failure by the Sixth Circuit to afford *Auer* deference to the FCC's interpretation of regulations and orders implementing the Act provides an additional independent basis for granting the petition.

The Sixth Circuit's decision imperils Congress' requirement that incumbent local exchange carriers (ILECs) share their equipment and services with competitive local exchange carriers (CLECs). Specifically, the Sixth Circuit eliminated the requirement to make entrance facilities available to CLECs either as a means of interconnection with the ILEC's network — at cost-based rates — or as unbundled network elements — at market rates. 47 U.S.C. §§ 251(c)(2)-(3). The Sixth Circuit's decision directly conflicts with on-point decisions of the Seventh, Eighth, and Ninth Circuits creating a significant split of authority because of the newly established uncertainty on a previously settled legal issue. Moreover, the Sixth Circuit's decision challenges Congress' goal of opening local telephone markets to competition by increasing a CLEC's cost of market entry, which creates an advantage for incumbent carriers at the expense of consumers. Due to the split of authority and the considerable importance of the issue, Petitioners and Respondent agree that this issue is ripe for the Court's review.

Equally important for the Court's consideration is the Sixth Circuit's refusal to afford deference to the Federal Communications Commission's (FCC) construction and interpretation of its own regulations in accordance with *Auer v. Robbins*.[1] In *Auer*, this Court found that a reviewing court should defer to an administrative agency's construction and interpretation of its own regulations. The Sixth Circuit gave superficial consideration to *Auer*, and in a footnote failed to afford the required level of deference to an expert administrative agency's interpretation of its own regulations. The Sixth Circuit's action squarely conflicts with the Ninth Circuit, which explicitly cited *Auer* when deferring to the FCC's interpretation of the relevant provisions of the agency's orders. Respondent attempts to minimize the significance of the Sixth Circuit evading this Court's decision, but the consequences of the Sixth Circuit's action warrant this Court's review.

ARGUMENT

I. The Petition warrants this Court's review because the Sixth Circuit's decision – which creates a conflict among the Circuits – is contrary to the Act's purpose of promoting competition in local telephone markets.

Respondent agrees that this Court should grant review of the Petition. (Resp. Br. 14-26). However, while arguing that certiorari should be granted, Respondent contends that this Court should affirm the Sixth Circuit's analysis that misinterprets the Act,

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[1] *Auer v. Robbins*, 519 U.S. 452 (1997).

disregards the FCC, and dismisses the decisions of three Circuits.

Like the Sixth Circuit, Respondent misinterprets the Act and the FCC's regulations and implementing orders. In making its "plain reading" analysis, the Sixth Circuit bases its reasoning on a fundamentally flawed premise, i.e., that "interconnection facilities and entrance facilities are different things."[2] In an attempt to provide clarity to a complex area of law, the Sixth Circuit contradicts previously established legal standards. The result of this erroneous assumption significantly alters the Act's purpose of furthering competition among telecommunication providers.

By substituting its judgment in place of the FCC's expertise and failing to defer to the FCC's reasonable interpretation of the Act, its supporting regulation, and the implementing orders, the Sixth Circuit overlooked the different uses of entrance facilities. Because the Sixth Circuit failed to defer to the FCC, Respondent attributes (Resp. Br. 22-23) dispositive significance to its own erroneous interpretations of the FCC's Orders that contradicted the expert agency's findings. As explained in the petition (Pet. at 7-16), Respondent's contentions are incorrect. The FCC has interpreted the Act consistent with Congress' intent to open local telephone markets to competition and under this framework has recognized the dual purpose of entrance facilities.

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[2] *Michigan Bell Tel. Co. v. Covad Communications Co.*, 597 F.3d 370, 384 (6th Cir. 2010).

The significance of the Sixth Circuit's decision is underscored by the fact that the three other Circuits – the Seventh, Eighth, and Ninth – which have addressed the question presented here have reached the opposite conclusion. Respondent argues that the sister Circuits misinterpreted paragraph 140 of the *Triennial Review Remand Order* (*TRRO*) (Resp. Br. 24); however, each of these three Circuits reached identical conclusions after reviewing the same statutes, regulations, and FCC interpretations. Moreover, the decisions of the Seventh, Eighth, and Ninth Circuits align with the FCC's expert opinion. But Respondent is correct that this decision of the Sixth Circuit warrants review.

II. The Petition warrants this Court's review because the Sixth Circuit's decision conflicts with this Court's precedent in *Auer v. Robbins* by failing to afford deference to the FCC's interpretation – creating an additional split of authority with the Ninth Circuit.

Respondent claims review is unwarranted on the question of when a lower court fails to apply this Court's decisions. (Resp. Br. 27-29). In fact, Respondent effectively asserts that ignoring a question of binding precedence is equivalent to simply requesting a claim of error correction. (Resp. Br. 27).

The Sixth Circuit, however, did more than commit a simple error when rejecting binding precedent. In *Auer v. Robbins*, this Court stated that an expert agency's construction of the regulation it administers must be given deference unless Congress

has "directly spoken to the precise question at issue."[3] In the absence of congressional direction, an expert agency, such as the FCC, is authorized to interpret any statutory ambiguities,[4] and an expert agency's interpretation of its own regulations is "controlling" so long as it represents a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation."[5] Federal appellate courts are required to follow the Court's directly controlling precedent.[6]

The FCC participated in this proceeding at the Sixth Circuit's request. Prior to the FCC's *amicus* brief, the parties had fully developed their positions for the Sixth Circuit's review, and on December 10, 2008, after oral arguments, the Sixth Circuit specifically requested the FCC to file an *amicus* brief addressing the issues at hand.[7] Following the submission of that *amicus* brief, and over a dissenting opinion, the Sixth Circuit, in a footnote, elected not to apply *Auer* deference.[8] (Pet. App. 10a-11a).

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[3] *Auer v. Robbins*, 519 U.S. at 457 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-843 (1984)).

[4] *Nat'l Cable Telecommuns. Ass'n v. Brand X Internet*, 545 U.S. 967, 280 (2005); *Chevron*, 467 U.S. at 843.

[5] *Coeur Alaska, Inc. v. Se. Alaska Cons. Council*, 557 U.S. __, 129 S. Ct. 2458, 2470 (2009); *Auer*, 519 U.S. at 461-462.

[6] *Nat'l Cable Telecommuns.*, 545 U.S at 986. citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (requiring the Courts of Appeals to adhere to our directly controlling precedents, even those that rest on reasons rejected in other decisions).

[7] Letter from Leonard Green, Clerk, U.S. Court of Appeals to the Sixth Circuit to Matthew Berry, General Counsel, FCC (December 10, 2008).

[8] *Michigan Bell Tel.*, 597 F.3d at 375.

While the Sixth Circuit acknowledged this Court's deference requirement in *Auer*, it rejected – with minimal analysis – the interpretation proffered by the FCC. In an effort to bolster the Sixth Circuit's decision, Respondent asserts that "[t]he court found the FCC's position in its *amicus* brief here to be 'so plainly erroneous or inconsistent with the regulation' that it 'decline[d]... to apply *Auer* deference' to that position." (Resp. Br. 27-28 citing Pet. App. at 10a). The assertion, while an accurate quote, is nonetheless a substantively hollow one because the Sixth Circuit provided no supporting analysis for the statement, and in a footnote, made a blanket statement disregarding the FCC's requested interpretation. (Pet. App. 10a-11a). As explained in greater detail in the petition (Pet. at 16-22), Respondent's assertions regarding deference ignore *Auer*.

Directly comparing the Opinions of the Sixth and Ninth Circuits raises a notable conflict — in addition to the courts' reaching opposite decisions on the merits — regarding the application of *Auer* deference. Respondent seeks to evade the significance of this Circuit split by suggesting that "the Ninth Circuit did not address the question whether the FCC's *amicus* brief warranted *Auer* deference." (Resp. Br. 28). Respondent tries to divert attention from the obvious split between the Sixth and Ninth Circuits on *Auer* deference by focusing on the FCC's *amicus* brief position while ignoring the Ninth Circuit's express reliance on the FCC's interpretation and the express rejection of the FCC's interpretation by the Sixth Circuit.

The Ninth Circuit held that the FCC's regulations authorize ILECs to provide entrance facilities to CLECs at cost-based rates for the purpose of interconnection.[9] This analysis was in part predicated on the lower court's deference to the FCC's interpretation of the relevant provisions of the *Triennial Review Order* (*TRO*). Specifically, after reviewing the applicable statutory provisions and regulations, the Ninth Circuit examined the FCC's interpretive orders, applied *Auer* deference, and concluded the FCC's interpretation was a reasonable one, saying:

> The TRO thus expressly interpreted the LCO to allow competitive LECs to lease entrance facilities or "transmission links" at TELRIC rates for the purpose of achieving interconnection. *This interpretation of the LCO is reasonable and entitled to deference. Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation.").[10]

Moreover the Ninth Circuit's application of *Auer* deference to the *TRO* demonstrates a recognition that CLECs use entrance facilities in two distinct ways. This dual use of entrance facilities has been

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[9] *Pacific Bell Tel. Co. v. California Public Utilities Comm'n*, 597 F.3d 958, 965 (9th Cir. 2010).

[10] *Pacific Bell*, 597 F. 3d at 968 (footnotes omitted)(emphasis added).

consistently acknowledged by the FCC, which indicated in the *TRO* that entrance facilities are used for two purposes:

- To provide a final link in the dedicated transmission path between a CLEC's customer and the CLEC's switch, and

- As interconnection facilities to exchange traffic between the CLEC's switch and the ILEC's switch.[11]

By not deferring to the FCC's interpretation and applying its "plain reading" analysis, the Sixth Circuit's decision fails to recognize a fundamental fact: that "interconnection facilities and entrance facilities are different things."[12] This fact is a critical one and one that has been recognized by the FCC, and by three other Circuits. Instead of applying the deference standard required by the Court's decision in *Auer*, the Sixth Circuit displaced a reasonable interpretation of the laws and regulations that the FCC administers and enforces, which directly conflicts with the Ninth Circuit's application of *Auer*.

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[11] *Review the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17202-17203 (¶¶ 365-366) (2003), vacated in part, *United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). (*TRO*).

[12] *Michigan Bell Tel. Co.*, 397 F.3d at 384.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Dated: November 2010

PETITIONER'S BRIEF

4

Supreme Court, U.S.
FILED
JAN 27 2011
OFFICE OF THE CLERK

No. 10-329

In the Supreme Court of the United States

ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND GREG R. WHITE, COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION, PETITIONERS

v.

MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T MICHIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Section 251(c) of the Telecommunications Act of 1996 (Act) requires an incumbent telephone carrier to make its network available to a competitive carrier, at cost-based rates, for "interconnection," which is the "linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. An "entrance facility" is a transmission facility that physically connects a competitive-carrier network with an incumbent-carrier network, and which can be used for the mutual exchange of traffic between an incumbent-carrier customer and a competitive-carrier customer. The first question presented is:

Whether the Michigan Public Service Commission (MPSC) can, consistent with § 251(c), require an incumbent carrier to provide a competitive carrier with an "entrance facility" at cost-based rates, when the entrance facility is used for interconnection.

2. Under this Court's decision in *Auer* v. *Robbins*, 519 U.S. 452 (1997), an agency's construction of its own rules, even in the form of a legal brief, is controlling when the interpretation reflects a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation." The Federal Communications Commission has filed legal briefing in this litigation that construes the FCC's orders and rules in the same manner as the MPSC and three federal circuits. The second question presented is:

Whether the FCC's interpretation is entitled to *Auer* deference.

PARTIES TO THE PROCEEDING

Petitioners are Orjiakor N. Isiogu, Monica Martinez, and Greg R. White, in their official capacity as Commissioners of the Michigan Public Service Commission and not as individuals.[1] Respondent is Michigan Bell Telephone Company, d/b/a AT&T Michigan.

Intervenors in the lower courts have included American Farm Bureau, Inc., Covad Communications Company, CMC Telecom, Inc., Climax Telephone Company, GRID 4 Communications, Inc., Easton Telecom Services, L.L.C., LDMI Telecommunications, Inc., MCImetro Access Transmission Services L.L.C., McLeodUSA Telecommunications Services, Inc., Neutral Tandem – Michigan, L.L.C., NOW Communications, Inc., PNG Telecommunications Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Talk America Inc., TCG Detroit, TelNet Worldwide, Inc., Trinsic Communications, Inc., XO Communications Services, Inc., and Zenk Group, Ltd., d/b/a Planet Access.

Amici curiae before the United States Court of Appeals for the Sixth Circuit were Verizon, the Federal Communications Commission, and the Michigan Internet and Telecommunications Alliance.

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[1] Orjiakor N. Isiogu and Greg R. White have been automatically substituted as parties under Sup. Ct. R. 35.3. Their predecessors, J. Peter Lark and Laura Chappelle, who were the named parties before the Court of Appeals, cease to hold public office.

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The February 23, 2010 opinion of the United States Court of Appeals for the Sixth Circuit is published and reported at *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F.3d 370 (6th Cir. 2010). Pet. App. 1a–45a.[2] The Sixth Circuit filed its unpublished order denying rehearing on June 2, 2010. Pet. App. 90a–91a. The September 26, 2007 opinion of the United States District Court for the Eastern District of Michigan, reversing the Michigan Public Service Commission's order, is unpublished. Pet. App. 143a–169a. The Michigan Public Service Commission's September 20, 2005 order, which held that the Telecommunications Act of 1996 requires entrance facilities to be made available at cost-based rates when used for interconnection, is unpublished. Pet. App. 170a–233a.

JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 [codified in numerous sections of Title 47 of the United States Code]. Section

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[2] All the references in the brief to the petition appendix are from Talk America's petition appendix.

251(c)(2)-(3) of the Act, 47 U.S.C. §§ 251-52, is reproduced in Pet. App. 92a–111a.

The Federal Communications Commission (FCC) has adopted regulations relevant for the Act, including 47 C.F.R. § 51.5, 47 C.F.R. § 51.305, and 47 C.F.R. § 51.319, which are reproduced in the Appendix to this brief. Br. App. 1a–7a.

In the Triennial Review Remand Order (TRRO), released on February 4, 2005, the FCC interprets the Act. The applicable paragraphs of the TRRO, 20 FCC Rcd. 2533, 2609–12, ¶¶ 136-141, are reproduced in the Appendix to this brief. Br. App. 8a-16a. The appendix also includes ¶¶ 365–367, 370 from the Triennial Review Order (TRO), issued on September 17, 2003, Br. App. 17a-26a, and ¶ 553 of the Local Competition Order (LCO), released on August 8, 1996, Br. App. 27a-29a.

Given the complexity of terms involved in this case, the Commissioners of the Michigan Public Service Commission have provided a Summary of Important Terms and Concepts Used in this Brief. Brief, pp. 45–54.

INTRODUCTION

This case raises the important question of whether an incumbent (i.e., established) telephone carrier is obligated to provide so-called "entrance facilities" to competitive carriers (i.e., new local market entrants), at cost-based rates, when such facilities are used solely for interconnecting the networks of the incumbent carrier and the competitor. The Federal Communications Commission (FCC) has answered that question yes, and so should this Court.

Section 251(c) of the Telecommunications Act of 1996 (Act) allows a competitive telephone company to enter a local telephone market by using an incumbent carrier's network of wires and switches. There are two, partially overlapping subsections that implement this policy. Section 251(c)(2) requires an incumbent carrier to provide cost-based "interconnection," which is a "linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5; Br. App. 1a. Section 251(c)(3) separately requires an incumbent carrier to provide cost-based access to certain elements of the incumbent's network on an unbundled basis. The Act delegates to the FCC the responsibility to determine which network elements must be unbundled.

The present dispute involves a part of the network known as an "entrance facility." In the 2005 Triennial Review Remand Order, commonly called the TRRO, the FCC defined entrance facilities as "the transmission facilities that connect competitive LEC [local exchange carrier] networks with incumbent LEC networks." *In the matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*

Carriers, Order on Remand, 20 FCC Rcd. 2533, 2609 ¶ 136 (2005)(TRRO[3]); Br. App. 8a. In other words, an entrance facility physically links two carriers' networks. As the FCC has explained, competitive carriers can use entrance facilities for multiple purposes. One use is for the mutual exchange of traffic between an incumbent-carrier customer and a competitive-carrier customer. Another use, known as "backhauling," allows a competitive carrier to connect, for example, two of its own customers by using the incumbent-carrier's network. *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17203, 17206–07 (¶¶ 365, 370) (2003) (TRO); Br. App. 17a–19a, 25a–26a.

In the TRRO, the FCC determined that an incumbent carrier is not obligated to provide a competitive carrier with unbundled, cost-based access to entrance facilities (as opposed to interconnection) under § 251(c)(3). TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 137–40); Br. App. 10a–15a. But the FCC cautioned that this determination "does not alter the right of competitive [carriers] LECs to obtain interconnection facilities pursuant to section 251(c)(2)." *Id.* at 2611 (¶ 140); Br. App. 15a. The issue, then, is whether an "entrance facility" can, in some instances, be used as an "interconnection" for purposes of § 251(c)(2), thus triggering an incumbent carrier's statutory obligation to provide a cost-based entrance facility.

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[3] As explained in more detail below, the FCC has issued four sets of regulations implementing the Telecommunications Act. The third set, issued in 2003, is called the TRO. The fourth set, issued in 2005, is called the TRRO. Both are relevant to this dispute.

The answer is yes, for two reasons. First, as just noted, an entrance facility can be used to physically link two carriers' networks for the mutual exchange of traffic. TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. When so used, an entrance facility fits easily within the plain meaning of "interconnection" for purposes of § 251(c)(2). 47 C.F.R. § 51.5; Br. App. 1a (defining "interconnection" as the "linking of two networks for the mutual exchange of traffic").

Second, the FCC has said, in its *amicus* briefing in this very litigation, that an entrance facility can be used as a § 251(c)(2) "interconnection." The Seventh, Eighth, and Ninth Circuits have all agreed. And the FCC's fair and considered judgment is entitled to deference under this Court's decision in *Auer* v. *Robbins*, 519 U.S. 452 (1997). Accordingly, Petitioners respectfully request that this Court reverse the contrary holding of the Sixth Circuit.

STATEMENT OF THE CASE

A. The Telecommunications Act of 1996

Congress enacted the Telecommunications Act to end "the longstanding regime of state-sanctioned monopolies" of local telephone markets. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Recognizing that incumbent monopolist providers of local telephone service have strong economic incentives to delay and impede competition, Congress required incumbent carriers (sometimes described as "incumbent local exchange carriers," or "ILECs") to allow access to their equipment and services to carriers who hoped to enter a local market and compete (sometimes described as "competitive local exchange carriers," or "CLECs").

This sharing took the form of a number of statutory directives. Two are relevant to this litigation; both are contained in 47 U.S.C. § 251(c).

First, § 251(c)(2) requires that an incumbent carrier provide "interconnection" between its network and that of a competitive carrier at "just, reasonable, and nondiscriminatory" rates and terms. 47 U.S.C. § 251(c)(2). The term "interconnection" refers to the "linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5; Br. App. 1a. And the FCC has explained that the purpose of this linking is for the transmission and routing of telephone exchange traffic:

> (a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:
>
> > (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;
> >
> > (2) At any technically feasible point within the incumbent LEC's network including... [47 C.F.R. § 51.305(a); Br. App. 3a.]

Second, § 251(c)(3) requires an incumbent carrier to provide a competitive carrier with non-discriminatory access to certain elements of the incumbent carrier's network on an unbundled (i.e., *à la carte*) basis.[4] 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.319; Br. App. 6a–7a. Congress delegated to the FCC the

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[4] Examples of § 251(c)(3) elements that an incumbent carrier must provide on an unbundled basis include loops, subloops, and network interface devices. 47 C.F.R. § 51.319; Br. App. 6a.

responsibility to determine which of the incumbent carrier's non-proprietary network elements[5] must be made available on an unbundled basis, a decision that turns on whether a lack of access to the network element would "impair" the competitive carrier's ability to provide service. 47 U.S.C. § 251(d)(2)(B). The unbundling obligation allows a competitive carrier to create its own network using a combination of self-provided and incumbent-carrier-provided components (which the competitor leases), obviating the competitive carrier's need to build a duplicative and costly stand-alone network.

With respect to pricing for these two directives, § 252(d)(1) dictates that an incumbent carrier charge cost-based rates for both interconnection (under § 251(c)(2)) and access to unbundled network elements, (under § 252(c)(3)). 47 U.S.C. § 252(d)(1). The FCC's rules require an incumbent carrier to calculate these cost-based rates under a Total Element Long-Run Incremental Cost (TELRIC) methodology.[6] 47 C.F.R. § 51.505(b).

Finally, § 252 requires incumbent and competitive carriers to enter into a negotiated contract for interconnection or network elements, with the pertinent state

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[5] A "network element" is "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(35).

[6] The cost-based TELRIC is in contrast to the more expensive market-based rate and is a favorable rate for competitive carriers (and thus for consumers). See *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 841 (9th Cir. 2010), citing *Verizon* v. *FCC*, 535 U.S. 467, 489, 496-97 (2002). This Court affirmed the FCC's authority to establish the TELRIC cost-based rate in *Verizon*, 535 U.S. at 523.

public utility commission available to arbitrate any unresolved issues. 47 U.S.C. § 252.

B. Entrance facilities

The part of the network at the core of this dispute is a "entrance facility." The FCC has defined entrance facilities as "the transmission facilities that connect competitive [carrier] LEC networks with incumbent [carrier] LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. Put another way, "an entrance facility is the high capacity wire" that physically links two telephone networks. *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 842 (9th Cir. 2010).

As the FCC has explained, entrance facilities have multiple uses. For example, a competitive carrier can use an entrance facility to link the competitive carrier's network with that of an incumbent carrier so that the competitive carrier's customers can reach the incumbent carrier's customers. This is classic interconnection. *Pacific Bell*, 621 F.3d at 842 (citing TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 138–40) (Br. App. 11a–15a). A competitive carrier could also use an entrance facility to allow its own customers to reach one another using the incumbent carrier's network. This is an example of "backhauling." *Id.* (citing TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 138–40) (Br. App. 11a–15a)); accord FCC 6th Cir. Br. at 6–7; Pet. App. 124a–125a; (comparing a competitive carrier's use of an entrance facility for interconnection versus backhauling); TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a.

When an entrance facility is used for backhauling, there is no "interconnection," because there is no mutual exchange of traffic between two, linked networks. See TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a ("Competitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic *to and from its end users*.") (emphasis added). Because there is no traffic between the customers of the incumbent carrier and the competitive carrier in such a use, this is only "transport," not interconnection. See 47 C.F.R. § 51.5; Br. App. 1a (defining interconnection as the *mutual* exchange of traffic among two linked networks).

As explained below, the FCC has determined that an incumbent carrier does not need to provide entrance facilities for the purpose of backhauling. TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 18a (the Act does not require an incumbent carrier "to unbundle transmission facilities connecting [incumbent] networks to competitive LEC networks for the purpose of *backhauling traffic*."). But that determination leaves unchanged the obligation under § 251(c)(2) and 47 C.F.R. § 51.305 for an incumbent carrier to provide for cost-based interconnection.

C. The FCC Proceedings

1. The FCC's first two sets of implementing regulations require incumbent carriers to provide entrance facilities as unbundled network elements under § 251(c)(3).

The FCC issued its first set of implementing regulations in August of 1996. *In re Implementation of*

the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499 (1996). Finding impairment everywhere, the FCC required incumbent carriers to unbundle all of their interoffice-transmission facilities, which would have included entrance facilities. This Court vacated the FCC's order and remanded for a more-detailed impairment analysis. *Iowa Utils. Bd.*, 525 U.S. at 397.

The FCC issued new regulations in November 1999, known as the LCO. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999). Again, the FCC found impairment everywhere and required incumbent carriers to unbundle all interoffice-transmission facilities. And again, a court vacated and remanded for a more-detailed impairment analysis. *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002).

2. The FCC's third set of regulations concludes that an incumbent carrier does not need to provide entrance facilities on an unbundled basis under § 251(c)(3).

In August 2003, the FCC issued its third set of regulations, known as the TRO. *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003). This time, the FCC concluded that it was unnecessary to conduct an impairment test with respect to entrance facilities, based on the agency's finding that entrance facilities were not within the incumbent carrier's network and,

thus, did not meet the statutory definition of "network element" in § 251(c)(3). Accordingly, such facilities did not have to be unbundled. The reviewing court vacated and remanded the order for failing to conduct the impairment analysis for entrance facilities. The court did not discuss the FCC's distinction between entrance facilities used for backhaul and entrance facilities used for interconnection. *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004).

3. The FCC's fourth set of regulations concludes that an incumbent carrier does not need to provide entrance facilities on an unbundled basis, but must offer a cost-based entrance facility when such facility is used for § 251(c)(2) interconnection.

Finally, in February 2005, the FCC issued the TRRO, and this time, the rules were affirmed on appeal. *Covad Commc'ns. Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006). The TRRO provisions that address "entrance facilities" comprise six paragraphs of analysis, ¶¶ 136 through 141. In this section, the FCC responded to the 2004 remand from the D.C. Circuit in *United States Telecom*, in which the court required the FCC to determine whether entrance facilities were "network elements" under § 251(c)(3) that would subject them to an "impairment analysis." *United States Telecom*, 359 F.3d at 585–86.

In the TRRO, the FCC found that although an entrance facility is part of the incumbent carrier's network, a competitive carrier could effectively compete without access to entrance facilities, and therefore was not entitled to use entrance facilities as part of the unbundling obligation that § 251(c)(3)

imposes on an incumbent carrier. TRRO, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a. Critically, however, this finding did not relieve an incumbent carrier of its separate duty to provide a competitive carrier with access to entrance facilities under § 251(c)(2) for the purpose of interconnection. *Id.* As the FCC explained:

> **140.** [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. *Thus, competitive LECs will have access to these* ***facilities***[7] *at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.* [*Id.*; Br. App. 15a (emphasis added).]

The MPSC interpreted this provision to mean that competitive carriers "still have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2) of the federal Act." Pet. App. 185a. Accord *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (7th Cir. 2008) ("What the FCC said in

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[7] The Sixth Circuit panel majority below assumed that the FCC's last reference to "facilities" meant "interconnection facilities." Pet. App.16a. But as explained in more detail below, Section 251(c)(2) already makes clear that an incumbent carrier must provide interconnection at cost-based rates, so there would be no reason for the FCC to restate that rule in Paragraph 140. As the FCC explained in its Sixth Circuit *amicus* brief, "the MPSC's interpretation of [the term 'interconnection facilities'] to include entrance facilities when used for interconnection *is fully consistent with the FCC's finding in the TRRO.*" FCC 6th Cir. Br. at 20; Pet. App. 138a.

¶ 140 is that ILECs must allow use of entrance facilities for interconnection at 'cost-based rates'."); *Southwestern Bell Tel., L.P.* v. *Missouri Public Service Comm'n*, 530 F.3d 676, 683–84 (8th Cir. 2008) ("The FCC's finding of non-impairment does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic. . . . If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC."); *Pacific Bell*, 621 F.3d at 846 (The FCC has interpreted its orders "to allow competitive LECs to lease entrance facilities or 'transmission links' at TELRIC rates for the purpose of achieving interconnection. This interpretation . . . is reasonable and entitled to deference.") (citing *Auer*, 519 U.S. at 461).

D. Proceedings Below

1. MPSC decision

Under Michigan law, the MPSC has regulatory authority over the intrastate operations of telecommunications carriers. Mich. Comp. Laws § 484.2201 *et seq.* Michigan Bell Telephone Company, d/b/a AT&T Michigan (AT&T), is an incumbent carrier that provides intrastate telecommunications service in Michigan. So when AT&T announced it would begin charging higher (i.e., competitive rather than cost-based) rates for entrance facilities, various competitive carriers complained to the MPSC, arguing that TRRO, ¶ 140 says that a competitive carrier is still entitled to use an entrance facility at cost-based rates for

purposes of interconnection with an incumbent carrier's network.

On May 17, 2005, the MPSC issued an order modifying the process used to bring current interconnection agreements into compliance with the FCC's TRO and TRRO. Pet. App. 170a–233a. One of the 29 disputed issues the MPSC resolved was the treatment of entrance facilities. Pet. App. 183a–185a.

After reviewing the evidence, the MPSC issued its decision on September 20, 2005. Consistent with the interconnection obligations imposed by the Act and the TRRO, the MPSC found that, when used for interconnection purposes, an incumbent carrier must provide entrance facilities to a competitive carrier at cost-based (i.e., TELRIC) rates. Pet. App. 183a–185a. The MPSC further determined that eliminating the requirement that an incumbent carrier provide entrance facilities at cost-based rates for interconnection purposes would be contrary to the FCC's findings in the TRRO. The MPSC's decision allows a competitive carrier's cost of interconnection to remain at cost-based pricing, thus preserving a competitive environment that allows for the continual growth of competition and results in lower-cost telephone services for Michigan consumers.

2. District Court decision

AT&T appealed the MPSC's Order to the U.S. District Court for the Eastern District of Michigan seeking declaratory and injunctive relief. Pet. App. 143a–144a. Following briefing and oral argument on cross-motions for summary judgment, the District Court issued a September 26, 2007 order granting, in

part, AT&T's motion, and granting, in part, the competitive carriers' motion. Pet. App. 143a–144a. On October 27, 2007, the District Court entered a judgment reversing in part the MPSC's September 20, 2005 Order. The District Court determined that the MPSC's decision undermined the TRRO's basic finding that entrance facilities were no longer required to be provided as an unbundled network element and should be offered at competitive pricing. Pet. App. 160a–161a.

3. Sixth Circuit decision

The MPSC Commissioners appealed to the United States Court of Appeals for the Sixth Circuit. At oral argument, the panel asked counsel whether to seek the FCC's view of its TRRO and other orders and rules. The same day, the Clerk of the Sixth Circuit sent a letter to the FCC's General Counsel inviting the FCC to file an *amicus curiae* brief.

The FCC filed its brief on April 3, 2009, urging the Sixth Circuit to reverse the district court's holding. Pet. App. 9a. In the brief, the FCC explained that entrance facilities "can be used for multiple purposes," including interconnection and backhauling. FCC 6th Cir. Br. at 6–7; Pet. App. 123a–125a. The FCC emphasized that its non-impairment finding with respect to entrance facilities did not alter the right of competitive carriers to obtain interconnection facilities under § 251(c)(2). *Id.* at 7; Pet. App. 125a. Moreover, it states that "[a]lthough the FCC did not [in the TRRO] specifically define what it meant by the term 'interconnection facilities,' the MPSC's interpretation of that term to include entrance facilities *is fully consistent with the FCC's finding in the TRRO*. The district court was thus

wrong to overturn the MPSC's decision on this point." *Id.* at 20; Pet. App. 138a (emphasis added).

In so concluding, the FCC rejected the position of AT&T and its *amici* that the interconnection § 251(c)(2) requires an incumbent carrier to provide is limited to making the network available "for the facilities and equipment of" the competitor, and does not require the incumbent to provide necessary facilities. *Id.* at 21; Pet. App. 138a. As the FCC explained, "[t]hat language does not delineate what an incumbent LEC must do in order to provide the interconnection 'for the facilities and equipment of' the competitive carrier, let alone establish unambiguously that an incumbent LEC's duty to provide interconnection does not include the provision of facilities that are necessary to achieve that interconnection." *Id.*; Pet. App. 139a.

On February 23, 2010, the panel majority rejected the FCC views the panel had solicited and affirmed the district court, concluding that the "plain meaning" of the Act, its regulations, and the TRRO allowed an incumbent carrier to charge a competitive carrier at market-based rates for the use of the incumbent carrier's entrance facilities as long as the incumbent carrier offers other interconnection facilities at cost-based rates. Pet. App. 1a–45a. The panel majority did not take issue with the FCC's interpretation of the Act

in the TRRO.[8] Instead, the panel majority restated in its own words the key passages of the TRRO, then concluded that its own interpretation of the restated passages was more plausible than the FCC's. Pet. App. 17a–18a.

In dissent, Judge Sutton criticized the panel majority and concluded that the FCC's interpretation of its own regulations was fair and considered. Pet. App. 33a–45a. Judge Sutton stated:

> In deciding what incumbents may charge for the use of their entrance facilities, the FCC interprets its regulations to draw a distinction. On one side of the line, incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection. On the other side, incumbents may charge market-based rates, or not lease the facilities at all, when competitors use the facilities for backhauling. *See* FCC 6th Cir. Br. at 15-17, 20. . . . [W]e must keep in mind that Congress charged the FCC with administering § 251, *see* 47 U.S.C. § 251(d)(1), and the FCC wrote the regulations at issue, all of which means that the FCC's interpretation binds us

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[8] In this respect, the Sixth Circuit was correct. A party seeking to challenge the FCC's authoritative interpretation of its own unbundling regulations in the TRRO was compelled to raise that claim in a petition for review within 60 days after the TRRO's entry. 28 U.S.C. § 2344. Although AT&T's predecessor did challenge the TRRO, it failed to assert any claim with respect to the FCC's statement in TRRO ¶ 140. *See generally Covad*, 450 F.3d 528. The propriety of ¶ 140 is therefore not subject to judicial review in this proceeding.

> unless it flouts the regulations' text. *See Auer*, 519 U.S. at 461. [Pet. App. 36a.]

He concluded that "The line drawn by the FCC permissibly interprets its own regulation." Pet. App. 36a–38a.

MPSC Commissioners petitioned for panel rehearing and rehearing *en banc*, noting that days after the panel's decision, the Ninth Circuit issued a decision reaching the opposite result and specifically applied *Auer* deference. The Sixth Circuit denied the petition. Pet. App. 90a–91a.

On June 2, 2010, the MPSC Commissioners timely filed a petition for a writ of certiorari and invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the petition on December 10, 2010.

SUMMARY OF ARGUMENT

The Telecommunications Act and its accompanying regulations are a technical labyrinth, exhibiting a degree of complexity found in few other areas of the law. Proof of this point can be found simply by reviewing the FCC's TRRO, which spans nearly 200 pages of the FCC Record. But there is no need for judicial gloss on the Act or the FCC's regulations. That is because the FCC's interpretation of the TRRO in its *amicus* briefing in this very litigation "respects the words of [the FCC's] regulations." Pet. App. 45a (Sutton, J., dissenting). In fact, the FCC's fair and considered interpretation of the TRRO has been endorsed by three of the four circuits to have addressed the entrance-facility issue, including 10 of the 12

circuit judges who have examined it. Because Congress has not specifically said whether an entrance facility can function as a § 251(c)(2) interconnection, and because the FCC's interpretation is not plainly erroneous or inconsistent with its own regulations, the FCC's interpretation is binding. *Auer*, 519 U.S. at 461–62

Turning to the language of the Act and the FCC's regulations and orders, it is plain that the FCC's *amicus* position in this litigation represents fair and considered judgment. While the TRRO reflects the FCC's finding that there is no § 251(c)(3) impairment with respect to entrance facilities, the FCC expressly cautioned that an incumbent carrier was still obligated to provide cost-based interconnection. Interconnection "is the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5; Br. App. 1a. And when a competitive carrier seeks an entrance facility to provide for the mutual exchange of traffic between customers of its own network and that of the incumbent carrier (as opposed to the transport of traffic solely between the CLEC's customers, an example of "backhauling"), the incumbent carrier must provide that interconnection, at cost-based rates, under § 251(c)(2). The MPSC's conclusion—that the term "interconnection facilities" includes entrance facilities when used for interconnection—is consistent with this regulatory scheme.

ARGUMENT

I. The Telecommunications Act and the FCC's implementing regulations require an incumbent carrier to provide a competitive carrier with entrance facilities, at a cost-based rate, for interconnection.

Section 251(c) makes clear that an incumbent carrier has two independent but overlapping duties to share its network with a competitive carrier. First, if the FCC finds impairment with respect to any particular element of an incumbent carrier's network, the incumbent carrier must offer that element to a competitor, "unbundled" (i.e., *à la carte*) and at cost-based rates. 47 U.S.C. § 251(c)(3). Second, and wholly separate from the unbundling obligation, the incumbent carrier must provide to competitors interconnection with the incumbent-provider network so that customers of each network can seamlessly connect with customers on the other. 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.5; Br. App. 1a (defining interconnection as the "linking of two networks for the mutual exchange of traffic").

In the TRRO, the FCC did not find § 251(c)(3) impairment with respect to entrance facilities. As a result, § 251(c)(3) does not require an incumbent carrier to provide entrance facilities at cost-based rates.

But the non-impairment finding did not answer the question of whether there are circumstances in which an incumbent carrier must provide an entrance facility at cost-based rates for § 251(c)(2) interconnection. The answer to that question is "sometimes." When an

entrance facility is being used solely for backhauling, e.g., to connect a competitive-carrier customer to another competitive-carrier customer, there is no "*mutual* exchange of traffic" among two linked networks and thus no interconnection. 47 C.F.R. § 51.5; Br. App. 1a (emphasis added). In contrast, when an entrance facility is being used to connect a competitive-carrier customer with an incumbent-carrier customer, then by definition there is a "mutual exchange of traffic" among the two linked networks. *Id.* This is classic interconnection. Accordingly, § 251(c)(2) requires an incumbent carrier to provide an entrance facility at cost-based rates when used for interconnection.

A. An entrance facility can be used for interconnection, such that § 251(c)(2) requires an incumbent carrier to provide the entrance facility at cost-based rates.

1. Entrance facilities can serve multiple purposes.

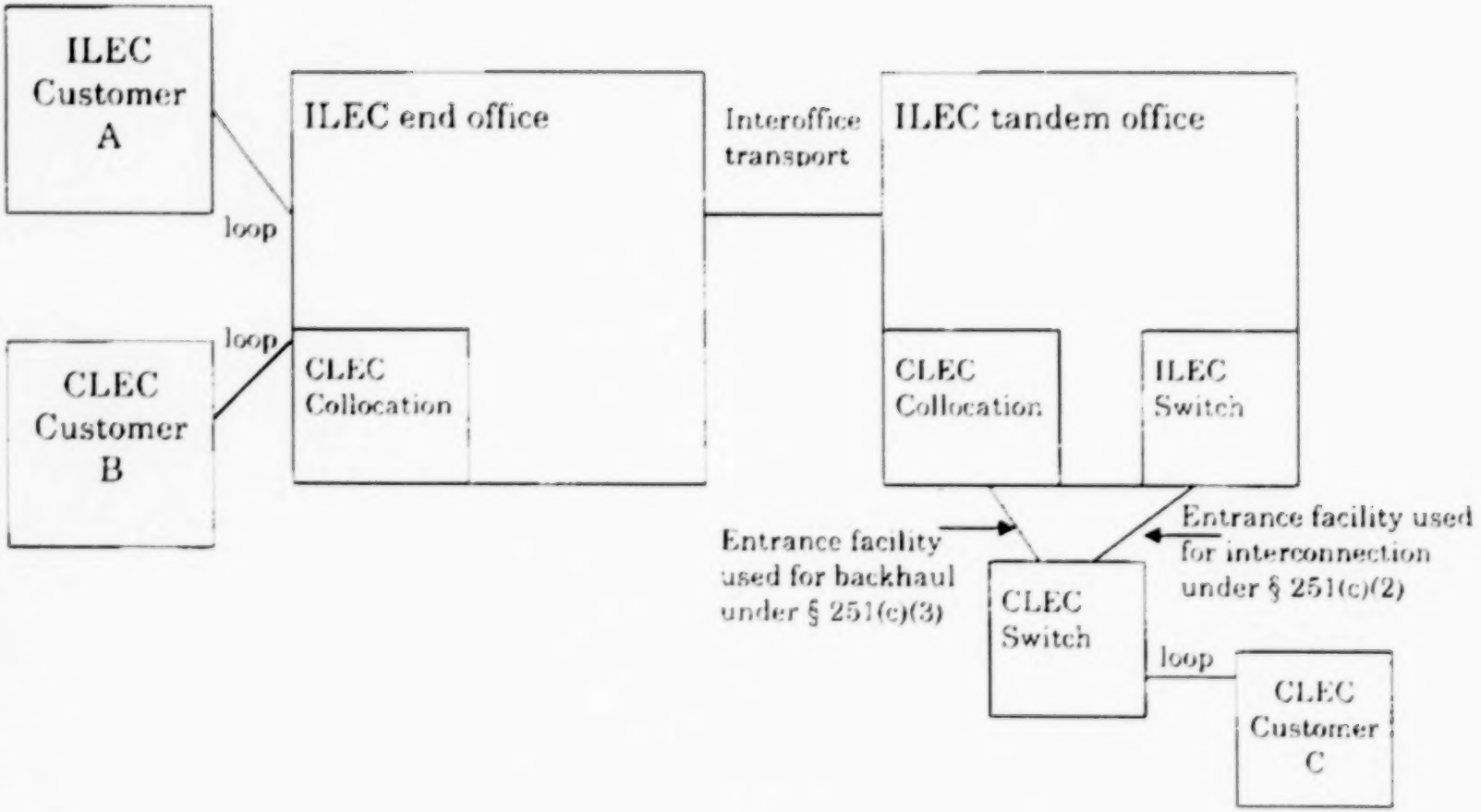
As noted earlier, "entrance facilities" are "the transmission facilities that connect competitive [carrier] LEC networks with incumbent [carrier] LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. In the Sixth Circuit's words, "an 'entrance facility' is really just a fancy name for a cable or wire used to transport calls from a CLEC switch [i.e., computer router] to an ILEC switch [same]." Pet. App. 3a.

Wires and cables can be used in multiple ways, and entrance facilities are no exception. One example is when a competitive carrier uses an entrance facility to

link its own network to an incumbent carrier's network so that a competitive-carrier customer and an incumbent-carrier customer can call each other. This type of access is a foundational component for a competitive carrier. Without it, no rational consumer would switch from the incumbent to the competitive carrier, because the consumer would be unable to reach the vast number of customers on the incumbent carrier's network.

A second example is when a competitive carrier uses an entrance facility to link its own network with that of an incumbent carrier so that the competitive carrier can transport the call from one of its own customers to another of its customers. This latter example is one type of "backhauling." TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 138–40)(Br. App. 11a–15a); accord FCC 6th Cir. Br. at 6–7 (Pet. App. 124a–125a). It is accomplished by using an entrance facility to transport traffic "from [a competitive carrier's] collocation arrangements to [the competitive carrier's] switches." TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a. In this example, there is no "mutual" exchange of traffic between the two networks, because all of the traffic is between customers of only one network. Contra 47 C.F.R. § 51.5; Br. App. 1a (requiring a "*mutual* exchange of traffic" (emphasis added)).

These two ways to use an entrance facility are illustrated in the (very simplified) diagram that appears on the following page and is described in the accompanying text.


ILEC Customer A
loop
ILEC end office
Interoffice transport
ILEC tandem office
loop
CLEC Customer B
CLEC Collocation
CLEC Collocation
ILEC Switch
Entrance facility used for backhaul under § 251(c)(3)
Entrance facility used for interconnection under § 251(c)(2)
CLEC Switch
loop
CLEC Customer C

a. Interconnection

Example one, described above, is illustrated by customer C, a competitive-carrier customer, and customer A, an incumbent-carrier customer. Customer C places a call that travels via loop to the competitive-carrier's switch (i.e., a routing computer), which sends the call to the incumbent-carrier's switch (another routing computer). The incumbent's switch sends the call via interoffice transport to the end office, where it can travel via loop to customer A. A mutual exchange of traffic between the two carriers' linked networks has just occurred.

The entrance facility in this example links the competitive carrier's switch with the incumbent carrier's switch, and thereby meets the definition of an entrance facility in § 136 of the TRRO. The entrance facility also links the two networks, because it brings traffic from the competitive carrier's network to the incumbent carrier's network. TRRO, 20 FCC Rcd. at 2610–11 (¶ 138); Br. App. 11a. This is paradigm interconnection. 47 U.S.C. § 51.5.; Br. App. 1a.

b. Backhauling

Example two is illustrated by customers C and B, both competitive-carrier customers. Customer C's call again travels via a loop to the competitive-carrier's switch, but this time, the routing computer does not need the incumbent-carrier's routing computer, because the call destination is another competitive-

carrier customer. Using collocation[9] and the incumbent's interoffice transport, the call is instead sent directly to the incumbent-carrier's end office, bypassing the incumbent's switch altogether. It then travels through another competitive-carrier collocation and loop to customer B. This is one form of backhauling, because the competitive carrier is carrying traffic "to and from its end users" and is "connecting incumbent [carrier] switches or wire centers" to do so. TRO, 18 FCC Rcd. at 17202–03 (¶ 365); Br. App. 17a–19a. Accord TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a (describing backhauling as the use of an entrance facility to transport traffic "from [a competitive carrier's] collocation arrangements to [the competitive carrier's] switches.").[10]

When backhauling is involved, the incumbent carrier is *not* obligated to provide the entrance facility at cost-based rates under § 251(c)(2), because there is no mutual exchange of traffic between the users of two networks. And because there is no impairment for competitive carriers to provide this service on their own under § 251(d), the competitive carriers must bear

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[9] The Act, in § 251(c)(6), requires the incumbent carrier to allow "physical collocation," which is the placement of the competitive carrier's equipment on the incumbent's premises to allow the competitive carrier to accomplish interconnection. *Verizon*, 540 U.S. at 406.

[10] The entrance facility is performing the function in both instances depicted as defined by the FCC regulations: it is "transport[ing] traffic to a switch[.]" TRRO, 20 FCC Rcd. at 2610 (¶ 138); Br. App. 11a–14a. In each, the entrance facility is also operating as "transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a-10a.

this cost, and incumbent carriers do not need to provide the entrance facility on an unbundled basis under § 251(c)(3). See TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 137, 138); Br. App. 10a-14a.

The fact that entrance facilities can serve multiple purposes is underscored by the FCC's TRO. In paragraph 365 of the TRO, the FCC describes two ways that competitive carriers use "entrance facilities"[11] between their own network and the incumbent network, "both for *interconnection* and to *backhaul* traffic." TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a (emphasis added).[12]

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[11] Paragraph 365 refers to "transmission connections," TRO 18 FCC Rcd. at 17203 (¶ 365), but ¶ 136 makes clear that entrance facilities *are* "transmission connections." TRRO, 20 FCC Rcd. at 2609 (¶ 136) (defining entrance facilities as "transmission facilities that connect competitive LEC networks with incumbent LEC networks.").

[12] AT&T argued below that by definition an entrance facility can never be a part of "interconnection" because entrance facilities are defined as a type of transport, see TRRO, 20 FCC Rcd. at 2609–10, 2612 (¶¶ 137, 141), and 47 C.F.R. § 51.5 (Br. App. 1a) then defines an interconnection as not including "transport." AT&T 6th Cir. Br. at 32–33. This argument overlooks the fact that entrance facilities are also defined as "transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a–10a. This latter definition easily includes the role of interconnecting two networks for the mutual exchange of traffic, the FCC's definition of interconnection in 47 C.F.R. § 51.5; Br. App. 1a. Thus, entrance facilities are a dedicated transport only insofar as they perform the role of backhauling; the FCC's TRO order, in evaluating dedicated transports in ¶ 365, makes clear the distinction between backhauling and interconnection.

The FCC's recognition that entrance facilities may serve a different function depending on whether customers of two networks are exchanging traffic is consistent with the concept of "entrance." In each circumstance, whether for interconnection or backhauling, the entrance facility links the competitive carrier's network with the incumbent carrier's network—in one circumstance for the mutual exchange of traffic of customers of two networks, and in the other to enable the competitive-carrier network's own customers to communicate. In either case, the entrance facilities enable the traffic to literally "enter" the incumbent's network.

Of course, in the situation in which the competitive carrier leases or otherwise accesses network elements from an incumbent carrier to allow for the communication only of its own customers (i.e., backhauling), the network that the competitive carrier creates is really its own, by filling in and using the necessary network elements owned by the incumbent carrier. See *Verizon*, 535 U.S. at 491–92 (describing that a competitive carrier "may choose to lease certain of an incumbent's 'network elements'" on an unbundled basis.) (footnote omitted); see also TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a. This dynamic is not present where a customer from the competitive carrier exchanges traffic with the incumbent carrier's customer (i.e., interconnection). In the latter circumstance, there is necessarily a mutual exchange of traffic between two *different* networks, that of the

incumbent carrier, and that of the competitive carrier.[13]

In sum, entrance facilities serve at least two distinct purposes. The question this Court must answer is whether an entrance facility serves an "interconnection" function when it allows for the mutual exchange of traffic between a customer on a competitive-carrier's network and a customer on an incumbent-carrier's network.

2. When an entrance facility connects a customer on a competitive-carrier's network to a customer on an incumbent-carrier's network, the entrance facility is serving the interconnection function that § 251(c)(2) contemplates.

Once it is understood that an entrance facility can be used in multiple ways, there is precious little to dispute regarding when an entrance facility can serve as an "interconnection." If a competitive carrier uses an entrance facility to connect a customer on the

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[13] 47 C.F.R. § 51.319(e), on which the Sixth Circuit relied, is consistent with the notion that an entrance facility can play multiple roles. That FCC regulation explains entrance facilities as a "dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. § 51.319(e); Br. App. 6a–7a. Entrance facilities are a "type" of dedicated transport, TRRO, 20 FCC Rcd. at 2612 (¶ 141)(Br. App. 15a), but they also are transmission facilities that "connect competitive LEC networks with incumbent LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. Consistent with the definition of entrance facility in 47 C.F.R. § 51.319(e), a dedicated transport that connects a pair of incumbent LEC wire centers obviously does not connect an incumbent LEC with a competitive LEC, i.e., it is not an entrance facility at all.

competitive carrier's network to a customer on the incumbent carrier's network, there is necessarily a mutual exchange of traffic occurring between two linked networks. This activity, by definition, is § 251(c)(2) interconnection. 47 C.F.R. § 51.5; Br. App. 1a ("Interconnection is the linking of two networks for the mutual exchange of traffic."). Accordingly, the incumbent carrier must provide interconnection for the transmission and routing of telephone exchange service and exchange access at cost-based rates. 47 U.S.C. § 251(c)(2). Conversely, if a competitive carrier uses an entrance facility to connect two customers on the competitive carrier's network, there is no mutual exchange of traffic. The entrance facility is serving a purely transport function, and such backhauling does not implicate § 251(c)(2).

One of the panel majority's errors below was its conclusion that an entrance facility connecting a competitive carrier's network to an incumbent carrier's network can never be an interconnection facility. Pet. App. 27a n.13. In fact, the panel majority's extraordinarily long and somewhat convoluted hypothetical involving extension cords and surge protectors connecting park visitors and a garage was based on the mistaken assumption that an incumbent carrier is not required to provide a connecting wire, only an outlet. The panel majority was wrong for numerous reasons.

First, 47 C.F.R. § 51.321(a) states that a carrier must provide "any technically feasible method of obtaining interconnection." Connecting a competitive-carrier switch to an incumbent-carrier switch through an entrance-facility wire is a feasible method of

obtaining interconnection. In fact, entrance facilities are "designed for the very purpose of linking two carriers' networks." *Ill. Bell Tel.*, 526 F.3d at 1072. *Compare* TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a (an entrance facility can be used to physically link two carriers' networks), *with* 47 C.F.R. § 51.5; Br. App. 1a (defining "interconnection" as the "linking of two networks for the mutual exchange of traffic").[14] And that is how competitors use entrance facilities: to connect with an incumbent-carrier network so the two networks can mutually exchange traffic. *See U.S. Telecom Ass'n* v. *FCC*, 359 F.3d 554, 586 (D.C. Cir. 2004). Because an entrance facility is a technically feasible way of obtaining an interconnection, an incumbent carrier may be obliged, in some instances, to provide it if a competitive carrier asks for it. 47 C.F.R. § 51.321(a).

Second, the FCC's regulations and orders make clear that an incumbent carrier's duty to provide "interconnection" relates to the provision of a facility, not merely an outlet for plug-in. Section 251(c)(2) requires an incumbent carrier to provide interconnection to "any technically feasible point within the [competitive] carrier's network." In other words, § 251(c)(2) may require, in some instances, that an incumbent carrier extend its own network to meet a competitive carrier's network, which necessarily

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[14] AT&T has argued that 47 C.F.R. § 51.319(e) states that an incumbent carrier has no obligation to provide entrance facilities. But what § 51.319(e) actually says is that an incumbent carrier "is not obligated to provide a requesting carrier with *unbundled access*" to entrance facilities. *Id.* (Br. App. 6a–7a)(emphasis added). AT&T could be correct only if the phrase "with unbundled access" is stricken from the regulation altogether.

requires the building or extending of the incumbent carrier's own facilities, not merely providing an outlet for the competitive carrier's plug.

The FCC regulations, in defining the phrase "technically feasible," support this understanding. The FCC explained that the incumbent may have to "modify" its facilities to meet a competitive carrier's request. 47 C.F.R. § 51.5; Br. App. 1a ("The fact that an incumbent LEC must *modify its facilities* or equipment to respond to such request does not determine whether satisfying such request is technically feasible.") (emphasis added). Again, an obligation to modify facilities indicates a duty to build or change existing facilities.

In the same way, in describing this duty of interconnection, the FCC regulations in § 51.305 require that the incumbent carrier "design" its interconnection facilities to meet the same standards used by the incumbent for its own network. 47 C.F.R. § 51.305(a); Br. App. 3a–4a ("At a minimum, this requires an incumbent LEC to *design* interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network.") (emphasis added). This regulation is likewise predicated on the assumption that the duty of providing "interconnection" may require the establishment of new facilities. The same is true in § 51.305(f), in which the FCC requires, "[i]f technically feasible," that an incumbent carrier "provide two-way trunking upon request." Br. App. 5a.

Most telling, however, are the FCC's regulations requiring an incumbent carrier to "build[]" its network to meet its interconnection obligation. Under 47 C.F.R.

§ 51.321 ("Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act"), the FCC requires that the "technically feasible methods" of achieving interconnection include "meet point interconnection arrangements." 47 C.F.R. § 51.321(b)(2). Meet-point facilities require both carriers to "build" transmission facilities from their networks to a designated meet point to link "for the mutual exchange of traffic." 47 C.F.R. § 51.5.

In sum, the FCC's regulations expressly contemplate that an incumbent carrier may have to build something to accomplish interconnection, rather than merely making an outlet available for plug-in.

Third, to follow the panel majority's reasoning renders the Act futile and fails to accomplish the Act's stated purpose. As this Court has repeatedly noted, Congress designed the Act to increase competition by regulating the relationship between the "monopolistic companies" that controlled local telephone service and the companies entering local markets to compete with the incumbents. *Verizon*, 535 U.S. at 476. One of the avenues used to provide for greater competition was "interconnection," by allowing a competitive carrier to build its own network to supplement the incumbent carrier's network. 47 U.S.C. § 251(c)(2); *Verizon*, 535 U.S. at 492.

The panel majority's suggestion below—that a competitive carrier could recreate an entire network and then merely "plug in" to the incumbent carrier's network to gain access to the incumbent's customers—would defeat the very purpose of the Act. As this Court noted in *Verizon*, the burden on a competitive carrier of building an entirely new network would create an

"insurmountable competitive advantage" for the incumbents:

> A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses. [*Id.*, at 490–91.]

By reducing this obligation to a "plug in" alone, the panel majority abrogates the FCC's regulations in several places (e.g., § 51.305(a), (f), and § 51.321(b)(2)) and leaves the competitive carriers in an untenable position. The panel majority's construction would undermine the competitive dynamic (and accompanying benefit for consumers) that the Act was intended to introduce.

B. The FCC's TRRO and the FCC's *amicus* briefing in this case affirm the conclusion that an incumbent carrier must charge cost-based rates when an entrance facility is used for § 251(c)(2) interconnection.

In the TRRO, particularly paragraphs 136–39, the FCC engaged in the impairment analysis that 47 U.S.C. § 251(c)(3) and *Covad* required. But because that was a discussion about impairment, the discussion is irrelevant to the interconnection issue that § 251(c)(2) frames. See 47 U.S.C. § 251(d)(2); FCC 6th Cir. Br. at 16 (Pet. App. 134a); *Ill. Bell Tel.*, 526 F.3d at 1072 (whether an incumbent carrier can charge

market-based rates for interconnection "is not related to the scope of an ILEC's obligations under § 251(c)(3) to furnish unbundled network elements").

To the contrary, the only place where the TRRO deals with *interconnection* in the context of entrance facilities is paragraph 140. And there, the FCC cautions that its § 251(c)(3) analysis should not be confused as affecting an incumbent provider's § 251(c)(2) interconnection duties. TRRO, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a ("our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)"). In other words, "[w]hat the FCC said in ¶ 140 is that an incumbent carrier must allow use of entrance facilities for interconnection at 'cost-based rates.'" *Ill. Bell. Tel.*, 526 F.3d at 1072. Accord *Southwestern Bell Tel.*, 530 F.3d at 681 ("The TRRO found CLECs did not need entrance facilities for backhauling CLEC to CLEC traffic. Conversely, the TRRO reiterated that ILECs are required to provide entrance facilities at TELRIC rates under § 251(c)(2) if necessary for interconnection purposes."); *Pacific Bell*, 621 F.3d at 846 (the FCC allowed "competitive LECs to lease entrance facilities or 'transmission links' at TELRIC rates for the purpose of achieving interconnection."); FCC 6th Cir. Br. at 20 (Pet. App. 138a) ("the MPSC's interpretation of [the term 'interconnection facilities'] to include entrance facilities when used for interconnection is fully consistent with the FCC's finding in the TRRO").

The TRRO also supports the view that entrance facilities can be used for interconnection or to

backhaul. To begin, two of the TRRO's key paragraphs addressing entrance facilities contained footnotes that dealt specifically with backhauling. TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a (noting a competitive carrier's success in obtaining entrance facilities from third-party providers for "backhaul" from the competitive carrier's collocation arrangements to its switches; the statement is predicated on the fact that entrance facilities may provide for backhauling); TRRO, 20 FCC Rcd. at 2612 (Br. App. 16a) (¶ 141 n.396) (confirming that backhauling and interconnection are distinct functions for entrance facilities)(Br. App. 16a).

More important, the conclusion that "entrance facilities" may provide for interconnection or backhauling, depending on their use, is consistent with the FCC's recognition that "entrance facilities are used to transport traffic *to a switch*." TRRO, 20 FCC Rcd. at 2610 (¶ 138); Br. App. 11a–14a (emphasis added). The movement of traffic may occur when either providing for interconnection, i.e., for the mutual exchange of traffic from customers (end users) in two networks, or for backhauling, e.g., moving traffic between customers in only a single network. The fact that entrance facilities move traffic is compatible with these two purposes.

This distinction between "entrance facilities" providing for interconnection and those providing for backhauling is the only reason that the FCC bothered to provide the limitation included in ¶ 140 of the TRRO. The purpose of the six paragraphs of the TRRO governing entrance facilities is to explain that there is no obligation for the incumbent carrier to provide for

such facilities as unbundled network elements under § 251(c)(3) because there was no impairment; the competitive carriers are able to build entrance facilities themselves. TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 137, 138); Br. App. 10a–14a. If entrance facilities could never provide for interconnection, as the panel majority asserted below, there would be no reason to explain any limitation. The entire point of ¶ 140 is to clarify that this non-impairment does not alter the right of competitive carriers to obtain "interconnection" under § 251(c)(2). If interconnection is a concept entirely distinct from entrance facilities, this would be a gratuitous point; the TRRO's previous paragraphs would not have suggested any other outcome.

The panel majority's mistakes are exemplified in its decision to literally rewrite ¶ 140 of the TRRO to say that "competitive LECs will have access to these *[interconnection] facilities* at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." Pet. App. 16a (emphasis added). To interpret the word "facilities" as referring to "interconnection facilities" makes the entire sentence a superfluous restatement of § 251(c)(3). The reading that makes sense is to interpret the word "facilities" in ¶ 140 as referring to "entrance facilities." Under that interpretation, incumbent carriers are exempt from providing entrance facilities at cost-based rates except when these facilities are used for interconnection, just as the MPSC concluded.

II. The FCC's interpretation of the statutes and regulations it administers is entitled to deference under *Auer*.

Through its orders, the FCC has interpreted the Act and the implementing regulations while acknowledging the dual use of entrance facilities. Consistent with its past orders, the *amicus* brief the FCC filed in this litigation provided an unmistakable answer regarding the expert agency's interpretation of its own regulations. Granting appropriate deference to the FCC's interpretation is a second reason why this Court should reverse the panel majority's decision.

Absent Congress's express intent to address an issue, a court should give deference to an expert agency's construction of a statute it administers. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Review of the Act here demonstrates that Congress did not speak directly to whether an incumbent carrier has a duty to provide entrance facilities to a competitive carrier for the purpose of interconnecting the carriers' networks under § 251(c)(2). In the absence of congressional direction, the FCC is authorized to interpret any statutory ambiguities. *Nat'l Cable Telecommuns. Ass'n* v. *Brand X Internet*, 545 U.S. 967, 980 (2005); *Chevron*, 467 U.S. at 843.

Under its statutory authority in § 251(d), the FCC lawfully promulgated regulations establishing unbundling requirements, including what network elements should be unbundled. In the TRRO, the FCC determined that a competitive carrier is not impaired without access to entrance facilities, and therefore is not entitled to such facilities as an unbundled network

element. TRRO, 20 FCC Rcd. at 2609–12 (¶¶ 136–41); Br. App. 8a–16a. At the same time (and as noted in the FCC's Sixth Circuit *amicus* briefing), the FCC explicitly recognized an incumbent carrier's obligation under section 251(c)(2) to make entrance facilities available to a competitive carrier at cost-based rates when the competitive carrier requires them to interconnect with the incumbent carrier's network. TRRO, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a. And the FCC's TRRO underwent a formal notice-and-comment period before being issued. TRRO, 20 FCC Rcd. at 2543–45 (¶¶ 17–19); *see also* TRRO, 20 FCC Rcd. at 2666–69 (¶¶ 235–51).

In *Auer*, this Court held that an expert agency's construction of a regulation it administers must be given deference unless Congress has "directly spoken to the precise question at issue." 519 U.S. at 457. An agency's interpretation qualifies for deference when Congress authorizes an agency with the general authority to make rules, and, as here, the agency's interpretation was promulgated while exercising that authority. *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001). Application of an agency's regulations necessitates the agency's specific expertise; thus, an agency's ability to interpret its own regulations is "a component of the agency's delegated lawmaking powers." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). *See also Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566–68 (1980). When an agency provides an interpretation of its regulations, a court should not perform a *de novo* review of competing interpretations of the regulations; instead, courts should defer to the agency's fair and considered judgment unless it is plainly erroneous or

inconsistent with the regulation. *Coeur Alaska, Inc.* v. *Se. Alaska Cons. Council*, 557 U.S. ___, 129 S. Ct. 2458, 2470 (2009); *Auer*, 519 U.S. at 461–62; *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945).

These principles are important for all administrative agencies, but especially in the context of the FCC's orders here. A cursory review of the Act and its implementing regulations demonstrates that the relationship between incumbent and competitive carriers is a highly technical and complex subject matter. The FCC's orders delve into this technical area and provide guidance and regulatory certainty for market participants. "[B]road deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.*, 512 U.S. at 512 (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

A. The FCC's interpretation of its regulations in the TRRO is entitled to deference.

The FCC's interpretation of its regulations in the TRRO is a fair and considered judgment of the agency charged with administering the Act. While the panel majority below suggested that the TRRO is simply an "interpretative rule" and should not be afforded deference, Pet. App. 9a n.6, the TRRO is more than just an interpretive rule.

The purpose of interpretive rules is to explain or clarify an expert agency's regulations; however, interpretive rules are not subjected to a legislative notice-and-comment period. In contrast, through its TRO and TRRO, the FCC implemented the Act's provisions—precisely as Congress authorized—and adopted seven pages of amendments to the Code of Federal Regulations, all pursuant to a formal notice-and-comment period. TRRO, 20 FCC Rcd. at 2543–45 (¶¶ 17–19). See also TRRO, 20 FCC Rcd. at 2666–69 (¶¶ 235–51). Such procedure confirms that the TRRO is a legislative, not interpretive, rule. See *Lincoln* v. *Vigil*, 508 U.S. 182, 195–96 (1993).

Ultimately, however, whether the TRRO is a legislative or interpretive rule is entirely of academic interest. Courts defer to an agency's interpretation of its own rules because it "make[s] little sense" to impose a judicial interpretation on an agency that remains free to rewrite the rule the way it wants. *Auer*, 519 U.S. at 463. Moreover, consideration should be given to the FCC's interpretation due to the highly technical and complex nature of the Act and the regulations. When examining areas of such a technical nature, this Court has consistently recognized the importance of the administering agency's interpretation and that, at a minimum, a general level of deference should be afforded to the agency's interpretation. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139–40 (1944). Judicial deference to expert agency interpretations of rules and regulations is an essential element to providing regulatory certainty to market participants. *Coeur Alaska*, 129 S. Ct. at 2479. The FCC is the agency with the expertise required to clarify the interpretative and technical issues arising from the Act and its

implementation, and, consistent with *Auer*, deference should be afforded to the FCC's regulatory expertise.

B. The FCC's views as expressed in its *amicus curiae* brief are likewise entitled to deference.

The FCC participated in this proceeding below at the Sixth Circuit's request. The *amicus* brief the FCC filed offered further insight as to how the FCC interpreted its TRO and TRRO, confirming the MPSC's view that an incumbent carrier must provide entrance facilities at cost-based rates when used for interconnection:

> Although the FCC did not specifically define [in the TRRO] what it meant by the term "interconnection facilities," the MPSC's interpretation of that term to include entrance facilities when used for interconnection *is fully consistent with the FCC's finding in the TRRO.* The district court thus was wrong to overturn the MPSC's decision on this point.

FCC 6th Cir. Br. at 20; Pet. App. 138a (emphasis added). And it is legally irrelevant that the FCC's confirming views came in the form of an *amicus* brief. As this Court explained in *Auer*, substantial deference is still due:

> Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a "*post hoc* rationalization" advanced by

> an agency seeking to defend past agency action against attack. *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question. [*Auer*, 519 U.S. at 462.]

Very recently, in fact, this Court, citing *Auer*, deferred to the Federal Reserve Board's interpretation of a regulation that was similarly advanced in the Board's *amicus* brief:

> As in *Auer*, there is no reason to believe that the interpretation advanced by the Board is a "*post hoc* rationalization" taken as a litigation position. The Board is not a party to this case. And as is evident from our discussion of Regulation Z itself, see Part II-A, *supra*, the Board's interpretation is neither "plainly erroneous" nor "inconsistent with" the indeterminate text of the regulation. In short, there is no reason to suspect that the position the Board takes in its *amicus* brief reflects anything other than the agency's fair and considered judgment as to what the regulation required at the time this dispute arose.

Chase Bank USA, N.A. v. *McAvoy*, ___ U.S. ___, 2011 U.S. Lexis 914 (Jan. 24, 2011).

Moreover, when reviewing an agency's "fair and considered judgment," this Court has extended deference even beyond interpretations expressed in legal briefs, to those set forth in agency opinion letters.

E.g., *Coeur Alaska*, 129 S. Ct. at 2473; *id.* at 2479 (Scalia, J., concurring) ("[i]t is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions.").

In sum, *Auer* demands deference to the FCC's interpretation, both in the TRRO and the FCC *amicus* brief. It cannot be said that the FCC's interpretation is plainly erroneous when it reasonably respects the words of the Act and the FCC's own regulations, as described above, but also has the unanimous support of three federal-circuit opinions. *Illinois Bell Tel.*, 526 F.3d at 1072; *Southwestern Bell Tel.*, 530 F.3d 676 at 684; *Pacific Bell*, 621 F.3d at 846.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Dated: January 2011

IMPORTANT TERMS AND CONCEPTS USED IN THE BRIEF

Backhauling

"Backhauling" refers to a competitive carrier's use of an entrance facility to transport traffic between the competitive carrier's switch and the carrier's collocation facilities (housed in the incumbent carrier's office). TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a (competitive carriers can obtain entrance facilities "for backhaul from [a competitive carrier's] collocation arrangements to [that carrier's] switches."); TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a ("[c]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users."). This would include, for example, the transport of a call between two of the competitive carrier's customers. FCC 6th Cir. Br. at 6-7; Pet. App. 124a–125a.

The need to backhaul "derives from the use of a [competitor carrier's] switch located in a location relatively far from the end user's premises, which effectively requires competitors to deploy much longer loops than the incumbent." TRO, 18 FCC Rcd. at 17279 (¶ 480). To visualize this situation, please refer to the illustration on page 23 of this brief. When the competitive carrier desires to transport a call from CLEC customer C to CLEC customer B, one way to make that connection would be to run a wire (a "loop") from the CLEC Switch directly to CLEC customer B. The problem is that over long distances, this is a very expensive connection. *Id.* The primary purpose of the Telecommunications Act is to allow a competitive-

carrier to use the incumbent carrier's existing wires for this transport rather than installing new (essentially parallel) wires. See generally 47 U.S.C. § 251(c). The same principles would apply if the call originated with customer B, because the competitive carrier would have to run a long loop from customer B to meet the incumbent carrier's switch.

CLEC

A "competitive local exchange carrier." The Telecommunications Act refers to the competitive LEC, or CLEC, as the "requesting telecommunications carrier" in 47 U.S.C. § 251(c)(2) and (c)(3). The Telecommunications Act is designed to enable CLECs to introduce competition into an incumbent carrier's local market. *Iowa Utils. Bd.*, 525 U.S. at 371.

Collocation (Physical)

This word is defined in the FCC regulations as part of the phrase "physical collocation." The concept is that a competitive carrier will be able to:

(1) Place its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises;

(2) Use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service;

(3) Enter those premises, subject to reasonable terms and conditions, to install, maintain, and repair equipment necessary for interconnection or access to unbundled elements; and

(4) Obtain reasonable amounts of space in an incumbent LEC's premises, as provided in this part, for the equipment necessary for interconnection or access to unbundled elements, allocated on a first-come, first-served basis. [47 C.F.R. § 51.5.]

The Telecommunications Act provides that collocation is available at just, reasonable, and nondiscriminatory rates. 47 U.S.C. § 251(c)(6).

Cost-based

47 U.S.C. § 251(d) provides that § 251(c)(2) interconnection and § 251(c)(3) network elements charges "be based on the cost . . . of providing the interconnection or network element." It is generally a more favorable rate for competitive carriers. See *Pacific Bell Tel. Co. v. California Pub. Util. Comm'n*, 621 F.3d 836, 841 (9th Cir. 2010), citing *Verizon v. FCC*, 535 U.S. 467, 489, 496–97 (2002).

Dedicated transport

"Dedicated interoffice transmission facilities (dedicated transport or transport) are facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among incumbent LEC central offices and tandem offices, and to connect its

local network to the incumbent LEC's network." TRRO, 20 FCC Rcd. at 2576 (¶ 67).

End office

In practical terms, an end-office switch connects directly to a customer; a tandem-office switch connects to other switches. FCC regulations refer to the "end office" as part of the incumbent-carrier network, in describing a shared transport: "Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(4)(C).

Entrance facilities

Entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. "[E]ntrance facilities are used to transport traffic to a switch," TRRO, 20 FCC Rcd. at 2610 (¶ 138); Br. App. 11a–14a, and they are a type of dedicated transport. TRRO, 20 FCC Rcd. at 2610 ¶ 137; Br. App. 10a ("[w]e reinstate the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities"). TRRO, 20 FCC Rcd. at 2612 ¶ 141; Br. App. 15a–16a ("it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport.").

ILEC

An "incumbent local exchange carrier." See 47 U.S.C. § 251(c). Congress enacted the Telecommunications Act to end "the longstanding regime of state-sanctioned monopolies" of local telephone markets. *Iowa Utils. Bd.*, 525 U.S. at 371. The Act in 47 U.S.C. § § 251(h) and 252(j) define an incumbent local exchange carrier as the carrier that, as of the enactment of the Telecommunications Act, provided local exchange service to a specific area. This brief also refers to the incumbent LEC as the incumbent carrier.

Impairment

The Telecommunications Act requires the FCC to determine whether the failure to provide access to a § 252(c)(3) network element would "impair" the ability of a carrier seeking access to provide the services it seeks to offer. 47 U.S.C. § 252(d)(2).

Interconnection

"Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." 47 C.F.R. § 51.5, Br. App. 1a.

Interconnection facilities

The phrase appears in 47 C.F.R. § 51.305 regarding the quality of interconnection that an incumbent carrier must provide competitive carriers.

> (a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:
>
> (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;
>
> (2) At any technically feasible point within the incumbent LEC's network including, at a minimum:
>
> * * *
>
> (3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires an incumbent LEC to design *interconnection facilities* to meet the same technical criteria and service standards that are used within the incumbent LEC's network. . . . [47 C.F.R. § 51.305(a); Br. App. 3a–4a (emphasis added)]

The phrase "interconnection facilities" also appears in ¶ 140 of the FCC's TRRO order (Br. App. 15a):

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive

> LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. [Footnote omitted.] [TRRO, 20 FCC Rcd at 2611 ¶ 141.]

Local Competition Order (LCO)

In August of 1996, with the Local Competition Order, or LCO, the FCC issued its first set of implementing regulations after the enactment of the Telecommunications Act. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996).

Loops

Loops include "wires connecting telephones to switches[.]" *Iowa Utils. Bd.*, 525 U.S. at 371.

Meet-point interconnection arrangement

"A meet point interconnection arrangement is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point." 47 C.F.R. § 51.5.

Network

A network is a combination of facilities that allows a carrier to provide a telecommunications service. As this Court has explained:

> [A] local exchange carrier (LEC), . . . owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. [*Iowa Utils. Bd.*, 525 U.S. at 371.]

Network elements

"The term 'network element' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(35).

Route

A route is "a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches." 47 C.F.R. § 51.319(e); Br. App. 6a.

Switches

Switches are "equipment directing calls to their destinations[.]" *Iowa Utils. Bd.*, 525 U.S. at 371.

Tandem office

In practical terms, a tandem-office switch connects to other switches; an end-office switch connects directly to a customer. The FCC regulations refer to the "tandem office" as part of the incumbent LEC network, in describing a shared transport: "Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(4)(C).

TELRIC

The acronym means "Total Element Long Run Incremental Cost" i.e., the costing methodology adopted by the FCC to establish the cost-based rates required by 47 U.S.C. § 252(d). *Verizon Communications* v. *FCC*, 535 U.S. 467, 523 (2002).

Transmission facilities

The primary definition of entrance facilities relies on the use of the phrase: "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. In this context, it conveys the meaning of equipment that moves telephone traffic.

Triennial Review Order (TRO)

In August of 2003, the FCC issued its revised regulations governing the unbundling of network

elements under 47 U.S.C. § 251(c)(3) with the Triennial Review Order, or TRO. See *In the matter of review of the Section 251 Unbundling Obligations of incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003).

Triennial Review Remand Order (TRRO)

In February 2005, the FCC issued its most recent revised regulations governing the unbundling of network elements under 47 U.S.C. § 251(c)(3) with the Triennial Review Remand Order, or TRRO. See *Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2005).

Wire center

A wire center is "the location of an incumbent LEC local switching facility containing one or more central offices." 47 C.F.R. § 51.5; Br. App. 2a.

47 CFR 51.5

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * *

Interconnection. Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

* * *

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

Wire center. A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter. The wire center boundaries define the area in which all customers served by a given wire center are located.

47 CFR 51.305

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in § 51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires an incumbent LEC to design interconnection

facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier; and

(4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing

substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

47 CFR 51.319

§ 51.319 Specific unbundling requirements.

* * *

(e) Dedicated transport. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) Definition. For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) Availability. (i) Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers.

* * *

TRRO - PARAGRAPHS 136-141

D. Entrance Facilities

136. In the *Local Competition Order*, the Commission defined dedicated transport as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers. n375

The Commission reaffirmed this definition, which encompassed entrance facilities (the transmission facilities that connect competitive LEC networks with incumbent LEC networks), in the *UNE Remand Order*. n376 In the *Triennial Review Order*, we revised the definition of dedicated transport to exclude entrance facilities. n377 We determined that entrance facilities "exist *outside* the incumbent LEC's local network" and should therefore -- given section 251's focus on competition within the local network -- be excluded from the definition of dedicated transport. n378 We also limited the definition of dedicated transport to "those transmission facilities connecting incumbent LEC switches and wire centers within a LATA." n379 Reviewing the *Triennial Review Order*, the *USTA II* court indicated that our exclusion of entrance facilities from the definition of dedicated transport was at odds with the definition of "network element" found in section 153(29) of the Act. n380 Specifically, the court

found that we erred in excluding these facilities from the definition of dedicated transport for purposes of implementing the section 251 unbundling obligation. n381 The court noted, moreover, that "if entrance facilities are correctly classified as 'network elements,' an analysis of impairment would presumably follow." n382

n375 *Local Competition Order, 11 FCC Rcd at 15718, para. 440.*

n376 *UNE Remand Order, 15 FCC Rcd at 3842*, paras. *322-23.*

n377 *Triennial Review Order, 18 FCC Rcd at 17203-04, para. 366.* We also determined in the *Triennial Review Order* that our decision with respect to entrance facilities applied to transmission facilities connecting mobile wireless carriers' networks with incumbent LECs' networks, and that wireless carriers were therefore not entitled to unbundled access to these facilities. *Id. at 17206, para. 368.* Because we now conclude that wireless carriers may not obtain UNEs solely to provide mobile wireless service, we find it unnecessary to reconsider whether facilities linking wireless and incumbent LEC networks are properly considered entrance facilities. *See supra* para. 36.

n378 *Triennial Review Order, 18 FCC Rcd at 17203-04, para. 366* (emphasis in original).

n379 *Id. at 17202, para. 365.*

n380 *USTA II*, *359 F.3d at 585-86*; *see also 47 U.S.C. § 153(29)* (defining "network element" as "a facility or equipment used in the provision of a telecommunications service").

n381 *USTA II*, *359 F.3d at 585-86*. We do not interpret the court's decision to mean that we have no discretion to refine the statutory definition of "network element" for purposes of unbundling under section 251(c)(3). As we noted in the *Triennial Review Order*, the Act "does not provide guidance on which transmission facilities should be included in the definition of the transport network element." *Triennial Review Order*, *18 FCC Rcd at 17203, para. 366*.

n382 *USTA II*, *359 F.3d at 585-86*.

137. The *USTA II* court did not reject our conclusion that incumbent LECs need not unbundle entrance facilities, only the analysis through which we reached that conclusion. n383 In response to the court's remand, we reinstate the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities, but we find that requesting carriers are not impaired without unbundled access to entrance facilities. n384

n383 In fact, the court expressed skepticism that incumbent LECs should be required to build entrance facilities under any circumstances. *Id. at 586*.

n384 We reject suggestions that we define entrance facilities as a new UNE. Alpheus

Comments at 68-69, or as a member of the "loop" family, *id.* at 71; ATX, Bayring, *et al.* Reply at 48. Because the traffic aggregation potential inherent in entrance facilities more closely resembles that associated with dedicated transport, we reject these arguments and consider these facilities to be a type of transport. In any event, the distinction has no practical significance, because our analysis here does not rely in any way on our treatment of other loop or transport elements. Several commenters have argued that we should revise the definition of dedicated transport to replace the references to a requesting carrier's "wire center" and "switch" with the term "location," to ensure that the definition does not exclude non-switched services, particularly data services. Alpheus Comments at 72-73; ATX, Blackfoot, *et al.* Comments at 48-49. Because these commenters have supplied no evidence that otherwise-qualified data service providers have been unable to obtain unbundled transport under the definition we re-adopt today, and because in any case we make a national finding of non-impairment with respect to entrance facilities, we reject this proposal.

138. As the court suggested, we now conduct an impairment analysis with respect to entrance facilities and find that the economic characteristics of entrance facilities that we discussed in the *Triennial Review Order* support a national finding of non-impairment. n385 Specifically, entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. As we noted in the *Triennial Review Order*,

entrance facilities are used to transport traffic to a switch and often represent the point of greatest aggregation of traffic in a competitive LEC's network. n386 Because of this aggregation potential, entrance facilities are more likely than dedicated transport between incumbent LEC offices to carry enough traffic to justify self-deployment by a competitive LEC. n387 Moreover, competitive LECs have a unique degree of control over the cost of entrance facilities, in contrast to other types of dedicated transport, because they can choose the location of their own switches. n388 For example, they can choose to locate their switches close to other competitors' switches, maximizing the ability to share costs and aggregate traffic, or close to transmission facilities deployed by other competitors, increasing the possibility of finding an alternative wholesale supply. n389 In addition, they often can locate their switches close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities. n390

n385 When the Commission last conducted an impairment analysis for entrance facilities, in the *UNE Remand Order*, the Commission concluded that competitive LECs were impaired without unbundled access to entrance facilities. *UNE Remand Order, 15 FCC Rcd at 3851-52*, paras. 347-48. The Commission found the record lacking in evidence that "the competitive entrance facility market is providing requesting carriers with effective alternatives to unbundled transport for all, or substantially all of the routes requesting carriers would need in order to provide the services they seek to offer." *Id. at 3852, para. 348.* At the same time, however, the Commission noted that

"the entrance facility market appears to be the most mature segment of the interoffice transport market, and thus may, in some situations, provide requesting carriers with effective alternatives to unbundled transport for certain point-to-point routes." *Id.*

n386 See Triennial Review Order, 18 FCC Rcd at 17204-05, para. 367.

n387 *Id.* As described more fully below, the record contains evidence that competitive LECs are steadily deploying their own entrance facilities, or obtaining them from third-party providers, to replace entrance facilities formerly obtained from incumbent LECs. *See* Verizon Comments at 80-81; Verizon Comments, Attach. F, Declaration of Mohit Patel (Verizon Patel Decl.) at para. 15; BellSouth Comments at 54.

n388 *Triennial Review Order, 18 FCC Rcd at 17204-05, para. 367.*

n389 *Id. at 17204-05, para. 367.* The record contains evidence that competitive LECs are able to obtain entrance facilities from third-party providers. *See* NuVox Comments, Exh. A, Declaration of Keith Coker (NuVox Coker Decl.) at para. 3 ("Where available, NuVox utilizes third-party providers for backhaul from NuVox collocation arrangements to NuVox switches.")

n390 *Triennial Review Order, 18 FCC Rcd at 17204-05, para. 367.* The record indicates that entrance facilities tend to be much shorter in

length than transport facilities between two incumbent LEC offices. AT&T Comments at 47-48, 52.

139. The record in this proceeding also demonstrates that competitive LECs are increasingly relying on competitively provided entrance facilities. BellSouth notes, for example, that between October 2003 and September 2004, 10 percent to 20 percent of the entrance facilities it had provided to competitive LECs were replaced by facilities obtained from other sources. n391 Verizon states that between early 2003 and mid-2004, it migrated more than 32,000 entrance facility circuits to non-Verizon facilities. n392 No commenters in this proceeding have disputed this evidence, which indicates that wholesale alternatives to entrance facilities provided by incumbent LECs are widely available. And it appears that incumbent LECs and competitors alike continue to agree that entrance facilities are more competitively available than other types of dedicated transport. n393

n391 BellSouth Comments at 54 & BellSouth Padgett Aff. at para. 39.

n392 Verizon Comments at 81 & Verizon Patel Decl. at para. 15.

n393 *See, e.g.*, AT&T Comments at 52 (indicating that "almost all competitively deployed transport links are entrance facilities") (emphasis removed); Verizon Comments at 40-41; Verizon Comments, Attach. E, Declaration of Claudia P. Cuddy (Verizon Cuddy Decl.) at paras. 4-16 (describing Verizon's success in finding non-

incumbent LEC providers of entrance facilities outside its region); *see also Triennial Review Order, 18 FCC Rcd at 17205, para. 367 & n.1122.*

140. We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. n394 Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

n394 *Triennial Review Order, 18 FCC Rcd at 17204, para. 366.*

141. The evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities. n395 We also conclude that it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport. n396 As we have explained, entrance facilities are characterized by unique operational and economic characteristics that justify separate treatment: they are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. n397 For these reasons, we do not apply our test for other types of dedicated transport to entrance facilities.

n395 We find no justification in the record for making entrance facilities available on a transitional basis, as ALTS suggests, until carriers

have achieved sufficient volumes to make self-deployment efficient. ALTS *et al.* Comments at 90. As we explained above, the record shows that self-deployment or alternative wholesale provisioning of entrance facilities are viable alternatives given the possibilities for traffic aggregation and efficient location of competitive LEC switches. These factors demonstrate that requesting carriers are able to enter the market on an economic basis without unbundled access to entrance facilities, and we therefore decline to require such unbundling.

n396 *See Triennial Review Order, 18 FCC Rcd at 17204, para. 367* ("The economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction.") We thus reject commenters' suggestions that entrance facilities should be subject to the same test that applies to dedicated transport between incumbent LEC facilities. *See* AT&T Comments at 50-52; Loop-Transport Coalition Comments at 87; ATX, Bayring, *et al.* Reply at 48; McLeod Reply at 37.

n397 *See* AT&T Comments at 32 (noting that entrance facilities, compared to other transmission facilities, are better suited to self-deployment because they involve "enormous traffic" and "very short distances").

TRO - PARAGRAPHS 365-367, 370

3. Definition of Dedicated Transport

365. We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA. n1111 The Commission previously defined dedicated transport as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers. n1112

We conclude that our previous definition was overly broad. As we explain in this Part, competitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the

facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, n1113 we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.

n1111 Section 271 of the Act prohibits BOCs from providing in-region interLATA services unless the BOC meets very specific requirements, but transport and other services are permitted within a LATA without meeting such requirements. *See 47 U.S.C. § 271.* Therefore, we find that LATA boundaries serve as a reasonable limitation on the scope of BOC obligations to unbundle transport.

n1112 *Local* Competition *Order, 11 FCC Rcd at 15718, para. 440, reaffirmed in UNE Remand Order, 15 FCC Rcd at 3842,* paras. 322-23 (emphasis added); *see* 47 C.F.R. § 51.319(d)(1)(i); *see* NuVox *et al.* Reply at 34-36 (noting that the Commission's rules explicitly unbundle transmission facilities connecting incumbent LEC switches or wire centers with competitive LEC switches).

n1113 Specifically, section 251(c)(2) requires access to "the facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . . ." The *Local Competition Order* discussed the relationship between sections 251(c)(2) and 251(c)(3) only to the extent that the obligation under section 251(c)(3)

"allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection." *Local Competition Order, 11 FCC Rcd at 15636-37, para. 270.*

366. We find that a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches. n1114 Because the Act does not provide guidance on which transmission facilities should be included in the definition of the transport network element, we believe we have discretion to adopt a definition that is in keeping with the section 251's goal of opening the incumbent LEC's local network to competition. We find that transmission facilities connecting incumbent LEC switches and wire centers are an inherent part of the incumbent LECs' local network Congress intended to make available to competitors under section 251(c)(3). On the other hand, we find that transmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently a part of the incumbent LEC's local network. Rather, they are transmission facilities that exist *outside* the incumbent LEC's local network. Accordingly, such transmission facilities are not appropriately included in the definition of dedicated transport. We note that a previous Commission reached a different result finding that, because unbundling this type of transmission facility is "technically feasible" and "will reduce entry barriers into the local exchange market," it was appropriate to include such facilities within the definition of dedicated transport. n1115 We find that this approach was

misguided. The standard for unbundling is not "technical feasibility" and, moreover, just because a facility is capable of being unbundled does not mean that it is appropriately considered to be a network element for purposes of section 251(c)(3). We find that the more reasonable approach, and the one that is most consistent with the goals of section 251, is to not consider those facilities outside of the incumbent LEC's local network as part of the dedicated transport network element that is subject to unbundling. n1116 In reaching this determination we note that, to the extent that requesting carriers need facilities in order to "interconnect[] with the [incumbent LEC's] network," section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation. n1117 Therefore, we find that the dedicated transport network element includes only those "features, functions, and capabilities" of equipment and facilities that coincide with the incumbent LEC's transport network -- the transmission links connecting incumbent LEC switches or wire centers. n1118

n1114 For further discussion of the Commission's definition of "network elements," see *supra* Part V.A.

n1115 *Local Competition Order*, *11 FCC Rcd at 15718-19*, paras. *440-43*.

n1116 Our determination here effectively eliminates "entrance facilities" as UNEs and, therefore, moots the Commission's *Fourth Further NPRM* insofar as it proposes limitations on obtaining entrance facilities as UNEs. *UNE*

Remand Order, 15 FCC Rcd at 3914-15, paras. 492-96 (setting forth the *Fourth Further NPRM*). We note that the terms of the *Fourth Further NPRM* were expanded to include unbundled loop/transport combinations in addition to entrance facilities. *See generally Supplemental Order*, 15 FCC Rcd 1760; *Supplemental Clarification Order*, 15 FCC Rcd 9587. We address issues related to unbundled loop/transport combinations *infra* Part VII.A.

n1117 Section 251(c)(2) requires access to "the facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's *network* . . . for the transmission and routing of telephone exchange service and exchange access." *47 U.S.C. § 251*(c)(2) (emphasis added).

n1118 *Id.* § 153(29).

367. Our conclusion in this respect is buttressed by the fact that the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction. Competing carriers have control over where to locate their network facilities to minimize self-deployment costs, or the costs of using third-party alternatives for transport from the incumbent LEC's network. n1119 These backhaul facilities from incumbent LEC networks to competitors' networks are distinguished from other transport facilities because competing carriers have some control over the location of their network facilities that is lacking with regard to

transport as we define it here. Competing carriers control, in part, how they design and locate their networks, as opposed to obtaining a connection between two incumbent LEC wire centers. n1120 For instance, a competing carrier can choose to locate its switch very close to an incumbent LEC wire center to minimize costs associated with deploying fiber over longer distances. Similarly, a competing carrier can choose to locate its network equipment, such as its switch, near other competing carriers to share costs, or near existing competitive fiber providers that have already deployed competitive transport facilities. n1121 Competing carriers have no such choice in seeking to obtain transport within the network of incumbent LECs. We also note that transmission facilities used for backhaul from an incumbent LEC office to a competitive LEC network often represents the point of greatest aggregation of traffic in a competing carrier's network, and such carriers are more likely to self-deploy these facilities because of the cost savings such aggregation permits. n1122 Moreover, we find that our more limited definition of transport is consistent with the Act because it encourages competing carriers to incorporate those costs within their control into their network deployment strategies rather than to rely exclusively on the incumbent LEC's network. n1123

n1119 Although we are not in this subsection conducting an impairment analysis, we find that this economic difference significantly distinguishes our analysis of intra-incumbent LEC transmission facilities -- which we define to be transport -- from inter-network transmission facilities used for

backhaul. *See supra* Part V.B. (discussing the impairment standard).

n1120 The Commission recognized this principle in the *Local Competition Order* in its discussion of the choices competing carriers make in choosing an efficient point of interconnection. *See Local Competition Order*, *11 FCC Rcd at 15608, para. 209.*

n1121 Additionally, the BOCs describe "collocation hotels" as points of telecommunications traffic aggregation used by multiple carriers and ISPs to interconnect with each other. These collocation hotels are often located very close to an incumbent LEC central office for carriers to connect to the incumbent LEC's network. BOC UNE Fact Report 2002 at III-4 through III-5; *see also* Verizon Jan. 10, 2003 UNE-P *Ex Parte* Letter at 6 (describing the choice competitors have in the location of their network facilities when entering a market); WorldCom Reply at 130 ("Collocation hotels are useful places for carriers and very large customers to meet."). We find that collocation hotels, however, do not provide a substitute for the need to access within an incumbent LEC's network. *See* WorldCom Reply at 130.

n1122 Competing carriers agree that the most competitive type of transport is the link between an incumbent LEC wire center and a competitor's network. *See* Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 7 (filed Nov. 18, 2002) (WorldCom Nov.

18, 2002 EELs *Ex Parte* Letter) (asserting that because "entrance facility" deployment is so pervasive, incumbent LEC special access pricing closely mirrors UNE rates); Letter from Patrick J. Donovan, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Declaration of Richard Batelaan at para. 10 (filed Nov. 22, 2002) (Cbeyond Nov. 22, 2002 Transport *Ex Parte* Letter) (stating that "alternative provider [transport] facilities are typically used between Cbeyond's non-ILEC collocation point of presence ("POP") and the ILEC tandem office or offices where Cbeyond aggregates traffic.").

n1123 Finally, we do not want to delay the further development of intermodal solutions, such as point-to-point microwave, that competing carriers may use to hub traffic back to a common location. Some CMRS carriers state that they are able to use point-to-point microwave as an alternative to incumbent LEC transmission facilities on some routes. Nextel Comments at 6-7; Letter from Michael H. Pryor, Counsel for AT&T Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 11 (filed Jan. 7, 2003) (ATTWS Jan. 7, 2003 *Ex Parte* Letter) (approximately 4% of ATTWS transport links are microwave). We note that these carriers cite limitations on microwave including the need for zoning approval for towers, licensing, limited space on cell towers, and reliability concerns. *Id.* As a result, this type of self-provisioning is "not common." Nextel Comments at

6-7; *see* ATTWS Jan. 7, 2003 *Ex Parte* Letter, Attach. at 11.

* * *

4. Impairment Analysis

a. General Economic and Operational Characteristics of Transport

370. Competing carriers generally use dedicated transport as a means to aggregate end-user traffic to achieve economies of scale. Such transport carries their traffic within the incumbent LEC's network through the incumbent LEC's central offices to a point of aggregation. As noted above, ultimately, the traffic is carried to the competitor's switch, or other equipment, from an incumbent LEC central office along an inter-network facility often known as an entrance facility. When carriers self-deploy transport facilities, they typically deploy fiber rings that may connect several incumbent LEC central offices in a market. n1127 On these rings, carriers aggregate end-user traffic for backhaul to their switch, or other equipment, in a similar manner to the way in which carriers do in using incumbent LEC facilities. However, these fiber rings are often deployed to maximize the ability of competitors eventually to deploy loop facilities to connect directly buildings and customers to the transport fiber ring, without accessing unbundled loops at an incumbent LEC central office. n1128

n1127 *See* KMC Duke Aff. at para. 3 (stating that KMC typically invests in a local SONET network and collocates at three incumbent LEC

offices, including the tandem); Letter from Joan Marsh, Director - Federal Government Affairs, AT&T to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 5-8 (filed Oct. 4, 2002) (AT&T Oct. 4, 2002 *Ex Parte* Letter) (describing how AT&T deploys "metro rings").

n1128 For example, KMC designs its networks to reach 80% of the commercial buildings in each local market that it serves by either direct "on-net" service, or by using unbundled loops aggregated at incumbent LEC offices. KMC Duke Aff. at para. 3. Of the 80% of total buildings KMC is able to reach, over 36% can be reached "on-net," indicating that KMC's fiber ring deployment is significantly designed to bypass the incumbent LEC loop network where possible, rather than simply mirroring the incumbent LEC's transport network connecting incumbent LEC wire centers. *Id.*; AT&T Nov. 25, 2002 *Ex Parte* Letter, Attach. B at 1-2 (describing local "building rings" that are approximately 30 miles each and connect 10-15 buildings).

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553. Consistent with this view, other methods of technically feasible interconnection or access to incumbent LEC networks, such as meet point arrangements, in addition to virtual and physical collocation, must be available to new entrants upon request. n1344 Meet point arrangements (or mid-span meets), for example, are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible. n1345 Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the "point" of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on "the local exchange carrier's network" n1346 (e.g., main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection. n1347 In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point. We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection

arrangement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement. In an access arrangement pursuant to section 251(c)(3), however, the interconnection point will be a part of the new entrant's network and will be used to carry traffic from one element in the new entrant's network to another. We conclude that in a section 251(c)(3) access situation, the new entrant should pay all of the economic costs of a meet point arrangement. Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.

n1344 See Teleport comments at 26-30; see also Washington Utilities and Transportation Commission, Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, in Part, (Washington Commission Oct. 31, 1995), Docket No. UT-941464, at 45; Application of Electric Lightwave, Inc., MFS Intelnet of Oregon, Inc., and MCI Metro Access Transmission Services, Inc., Public Utility Commission of Oregon Order, Order No. 96-021, (Oregon Commission Jan. 12, 1996), at 68-69; Rules for Telecommunications Interconnection and Unbundling, Arizona Corporation Commission Order, Decision No. 59483, (Arizona Commission Jan. 11, 1996), Proposed Rule R14-2-1303 (Attachment E hereto).

n1345 The Michigan Commission recently required Ameritech to provide meet point interconnection. Michigan Public Service Commission, Case No. U-10860 (Michigan June 5, 1996) at 18 n.4.

n1346 *47 U.S.C. § 251(c)(2).*

n1347 See, supra Section IV.E., above, discussing accommodation of interconnection.

RESPONDENT'S BRIEF

FILED
MAR 1 - 2011
OFFICE OF THE CLERK

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Nos. 10-313 & 10-329

IN THE
Supreme Court of the United States

TALK AMERICA INC.
AND
ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND GREG R. WHITE, COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY D/B/A AT&T MICHIGAN, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether 47 U.S.C. § 251(c)(2) — which requires an incumbent local exchange carrier to provide interconnection "for the facilities and equipment of any [competing] carrier" at a "point within the [incumbent] carrier's network" — requires the incumbent to provide to a competing carrier, at extremely low, regulated rates, all of the facilities and equipment that the competing carrier uses to span the distance (which may be miles) between its own network and the incumbent's network.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Michigan Bell Telephone Company d/b/a AT&T Michigan states the following:

Michigan Bell Telephone Company d/b/a AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc., which in turn is a wholly owned subsidiary of AT&T Inc., a publicly owned corporation. AT&T Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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STATEMENT

Congress enacted the Telecommunications Act of 1996 ("1996 Act" or "Act")[1] to promote the development of facilities-based competition for local telephone service. One provision of the Act, 47 U.S.C. § 251(c)(3), requires incumbent local telephone companies, such as respondent AT&T, to lease their network facilities to competitors, such as petitioner Talk America Inc., at artificially low rates. The obligation to lease facilities under § 251(c)(3) applies *only* when the ability of competitors to compete with incumbents is impaired without access to the incumbent's facilities at those low rates. All parties agree that incumbents need not provide the facilities at issue here, known as "entrance facilities," under § 251(c)(3), because the Federal Communications Commission ("FCC" or "Commission") has found that competitors are not impaired without them: they can build their own entrance facilities or obtain them from providers other than incumbents.

Another provision of the Act, 47 U.S.C. § 251(c)(2), requires incumbents to provide "interconnection" for the facilities of a competitor at a point within the incumbent's network. Unlike § 251(c)(3), it does not create a facilities-leasing obligation. Rather, in the FCC's own words, interconnection refers only to the "physical linking of equipment and facilities" and does not include the "transport . . . of traffic."[2] Even so, petitioner the Michigan Public Service Commission, applying § 251(c)(2), required AT&T to lease

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[1] Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*)

[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 176 (1996) ("*Local Competition Order*").

entrance facilities to competitors at the same artificially low rates that had applied under § 251(c)(3) when the FCC had found that competitors are impaired. The federal government has filed an *amicus* brief endorsing that ruling. The government's theory, at least in this Court, is that a few sentences in FCC orders in 2003 and 2005 implementing § 251(c)(3) created an obligation for incumbents to lease entrance facilities to competitors under § 251(c)(2).

The court of appeals correctly held that the Michigan commission's order finds no support in the text, structure, or purposes of the 1996 Act, or the FCC's implementing rules or orders, and is therefore unlawful. The government's effort to support the Michigan commission's ruling is unavailing: the FCC's position is not entitled to deference under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Auer v. Robbins*, 519 U.S. 452 (1997), and the government's current interpretation of a few sentences in two FCC orders is unreasonable and inconsistent with their text. Further, neither petitioners nor the government attempt to reconcile with the purposes of the Act the Michigan commission's requirement that AT&T provide entrance facilities to competitors at artificially low rates, when the FCC long ago recognized that competitors can build those facilities themselves or buy access to them in the marketplace. The court of appeals' judgment should be affirmed.

A. Statutory and Regulatory Background

The 1996 Act. In the 1996 Act, Congress "subject[ed]" incumbent local exchange carriers ("LECs"), such as AT&T, "to a host of duties intended to facilitate market entry" by competing providers of local telephone service. *AT&T Corp. v. Iowa Utils. Bd.*,

525 U.S. 366, 371 (1999). Section 251(c) of the Act, 47 U.S.C. § 251(c), enables a competitor (a "requesting telecommunications carrier" in the statute's terminology) to "obtain access to an incumbent's network" in "three ways": interconnection, resale, and leasing of facilities (or "unbundling"). *Iowa Utils. Bd.*, 525 U.S. at 371.

First, under § 251(c)(2), the competitor "can interconnect *its own facilities* with the incumbent's network." *Id.* (emphasis added). Section 251(c)(2) states in pertinent part that an incumbent must "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). A competitor that chooses interconnection under § 251(c)(2) "decide[s] to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 491 (2002).

Second, "[a]t the other end of the spectrum," *id.*, the competitor "can purchase [retail] local telephone services at wholesale rates for resale" under § 251(c)(4). *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c)(4) thus "permits an entrant to skip construction and instead simply to buy and resell 'telecommunications service,' which the incumbent has a duty to sell at wholesale." *Verizon*, 535 U.S. at 491.

Third, "[b]etween these extremes," *id.*, the competitor "can lease elements of the incumbent's network 'on an unbundled basis'" under § 251(c)(3). *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c)(3) requires incumbents to "provide, to any requesting telecom-

munications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The statute defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." *Id.* § 153(29). The Act delegates to the FCC authority to identify required unbundled network elements (or "UNEs"). The FCC can require unbundling of a particular network element only when it has determined that "the failure to provide access to [that] network element[] would impair the ability of [competitors] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B).

Section 252(d)(1) establishes the pricing standard both "for the interconnection of facilities and equipment for purposes of [§ 251](c)(2)" and "for network elements for purposes of [§ 251](c)(3)." *Id.* § 252(d)(1).[3] The FCC implemented that pricing standard using a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent's "historical investment" or the cost of the "actual network element being provided." *Verizon*, 535 U.S. at 501. The FCC termed this pricing methodology "TELRIC" or "total element long-run incremental cost." *Id.* at 495-96.

The TELRIC formula results in very low rates that are "well below the costs the [incumbents] had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*"); *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) ("*Illinois Bell II*") (Posner, J.) (TELRIC rates are "just above the confiscatory level"). In upholding the

[3] *Cf.* 47 U.S.C. § 252(d)(3) (establishing different pricing standard for resale under § 251(c)(4)).

FCC's TELRIC-pricing methodology in the context of § 251(c)(3), this Court recognized that TELRIC rates were limited to "bottleneck elements." *Verizon*, 535 U.S. at 510 & n.27, 515-17; *see also Local Competition Order* ¶ 702 (observing that "unbundled network elements and interconnection services" "generally are bottleneck, monopoly services").

Section 251's duties are implemented through "interconnection agreements" established pursuant to § 252. Incumbents and competitors first attempt to negotiate terms implementing the § 251 duties. *See* 47 U.S.C. §§ 251(c)(1), 252(a). If those negotiations are unsuccessful, § 252 authorizes state regulatory commissions to act as arbitrators, applying the provisions of the Act and implementing FCC regulations. *See id.* § 252(b)-(d). State-commission decisions setting the terms of interconnection agreements are subject to review in federal court. *See id.* § 252(e)(6).

The FCC's orders implementing the 1996 Act. In its initial order implementing the Act, the 1996 *Local Competition Order*, the FCC addressed both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3).

Interpreting § 251(c)(2), the FCC promulgated a series of interconnection regulations. It specified certain "point[s] within" the incumbent's network where interconnection would occur, 47 C.F.R. § 51.305(a)(2), and identified two "methods" by which competitors could obtain interconnection with an incumbent's network, *id.* § 51.321(b). The few challenges to the Commission's interconnection rules were, for the most part, rejected, and those regulations exist largely unchanged today. As the government here concedes (at 22 n.6), those regulations "do not expressly require

incumbents to provide entrance facilities to satisfy the interconnection obligations under Section 251(c)(2)."

Interpreting § 251(c)(3), the FCC required incumbents to unbundle all of the network elements necessary to provide local telephone service. The basic components of the local telephone network, as this Court described them in *Iowa Utilities Board*, are "local loops (wires connecting telephones to switches)," "switches (equipment directing calls to their destinations)," and "transport trunks (wires carrying calls between switches)." 525 U.S. at 371.

Relevant here, the *Local Competition Order* required incumbents to "provide interoffice transmission facilities on an unbundled basis to requesting carriers." *Local Competition Order* ¶ 439. "Interoffice transmission facilities" are "transport facilities" that carry telecommunications traffic between switches. *Id.* ¶ 428; *see* 11 FCC Rcd at 16210-11 (promulgating 47 C.F.R. § 51.319(d)(1) (1996)).[4] They are the "transport trunks" to which this Court referred in *Iowa Utilities Board*. *See* 525 U.S. at 371.

The FCC further determined that unbundled interoffice transmission facilities included facilities running between incumbents' switches and competitors' switches. *See Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(1) (1996). Those are known as "entrance facilities." *See* App.[5] 3a; *USTA II*, 359 F.3d at 585 ("Entrance facilities are dedicated transmission facilities that connect [incumbent] and [competitor] locations."). The FCC ruled that competitors

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[4] The buildings in which incumbents' switches and ancillary equipment are housed are referred to as "central offices" or "end offices." *See* 47 C.F.R. pt. 36, App. A.

[5] References to "App." are to the appendix to the petition for a writ of certiorari filed by Talk America in No. 10-313.

were impaired without access to entrance facilities as UNEs, which it recognized were used both to exchange traffic with incumbents[6] and to connect the competitors' switches to loops leased from incumbents as UNEs[7] (the latter is sometimes referred to in the industry as "backhauling").

The FCC's rules implementing § 251(c)(3)'s unbundling obligations did not fare well in the courts. In 1999, this Court vacated the Commission's initial unbundling rules, finding, among other things, that the FCC had erroneously read the 1996 Act to require "blanket access to incumbents' networks." *Iowa Utils. Bd.*, 525 U.S. at 390; *see id.* (rejecting FCC's conclusion that whatever "can be provided must be provided" under § 251(c)(3)).

Later that year, the FCC re-promulgated virtually all of the unbundling rules this Court had vacated, including the rule requiring incumbents to unbundle entrance facilities. As in the *Local Competition Order*, the FCC found that competitors were impaired without access to entrance facilities, again noting the two uses to which competitors put those facilities. *See UNE Remand Order*[8] ¶¶ 346-348. In 2002, the D.C. Circuit vacated the FCC's second set of unbundling rules. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*").

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[6] *See Local Competition Order* ¶ 440 ("an interoffice facility could be used by a competitor to connect to the incumbent LEC's switch").

[7] *See id.* ("a competitor" may "use interoffice transmission facilities to connect loops directly to its switch").

[8] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

In 2003, the FCC issued its third unbundling order (the *Triennial Review Order*[9]), in which it revisited its prior determinations that § 251(c)(3) requires incumbents to unbundle entrance facilities. Characterizing its earlier approach as "overly broad" and "misguided," the FCC now concluded that entrance facilities "exist *outside* the incumbent LEC's local network" and, therefore, are excluded as a matter of definition from the category of network elements that could be subject to unbundling. *TRO* ¶¶ 365-366 & n.1116. As in prior orders, however, the FCC acknowledged that competitors had been using unbundled entrance facilities both to exchange traffic with the incumbent and to connect their own switches to loops leased from incumbents as UNEs, which the FCC now labeled "backhaul." *See id.* ¶¶ 365, 367; *see also id.* ¶ 480 (explaining that "[t]he need to backhaul the circuit [i.e., the loop] derives from the [competitor's] use of a switch located in a location relatively far from the end user's premises").[10]

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[9] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

[10] Although the *Triennial Review Order* was the first time the FCC used that term in the unbundling context, the FCC has used "backhaul" and its variants since at least 1975 to refer to a circumstance in which one carrier uses another carrier's network to transport traffic between its customer's premises and its switch. *See, e.g.*, Memorandum Opinion and Order, *International Record Carriers' Scope of Operations*, 54 F.C.C.2d 909, ¶ 33 (1975); Final Policy Statement, *International Record Carriers' Scope of Operations*, 58 F.C.C.2d 250, ¶¶ 17-18 (1976); Memorandum Opinion and Order, *AT&T Co. and the Bell System Operating Companies Restrictions on the Resale and Sharing of Switched Services used for Completion of Interstate Communications*, 94 F.C.C.2d 1110, ¶ 2 n.2 (1983).

On review, the D.C. Circuit did not accept the FCC's exclusion of entrance facilities from the Act's broad definition of "network elements." *USTA II*, 359 F.3d at 585. The court, however, did not question the FCC's conclusion that such facilities are outside the incumbents' local networks, noting that competitors depicted "entrance facilities" "as completely stand-alone items linking a [competitor's] switch with an [incumbent's] office" that "appear[] [to] exist exclusively for the convenience of the [competitors]." *Id.* at 586 (emphasis omitted). The D.C. Circuit therefore found it "anomalous that [competitors] do not themselves provide" their own entrance facilities. *Id.* Finding "the record too obscure to make any final ruling," the court "simply remand[ed] the matter for further consideration." *Id.*

In 2005, the FCC issued its fourth unbundling order (the *Triennial Review Remand Order*[11]), which responded to the D.C. Circuit's decision in *USTA II*. In light of the court's skepticism of the FCC's conclusion that entrance facilities are not "network elements," the FCC "reinstate[d] the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities." *TRRO* ¶ 137; *see id.* n.384 ("entrance facilities . . . [are] a type of transport"). The FCC did not, however, revisit its conclusion that entrance facilities exist outside the incumbent's local network.

The FCC then performed the impairment analysis with respect to entrance facilities that it had not conducted in the *Triennial Review Order*. In contrast

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[11] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

to the findings in the *Local Competition Order* and *UNE Remand Order*, the FCC concluded that competitors are not impaired anywhere in the nation in their ability to provide service without access to entrance facilities at TELRIC rates: "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between [two] incumbent LEC central offices." *Id.* ¶ 138; *see id.* ¶ 141 & n.395. Competing LECs can "choose to locate their switches" in order to "minimiz[e] the length and cost of entrance facilities" and to "increas[e] the possibility of finding an alternative wholesale suppl[ier]." *Id.* ¶ 138.[12] In making those findings, the FCC did not distinguish between uses to which competitors put those facilities. *See id.*[13]

The FCC accordingly amended its regulations to state that incumbents need not provide unbundled access to entrance facilities. *See* 47 C.F.R. § 51.319(e)(2)(i). Although various parties sought

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[12] Thus, as the FCC recognized, competitors can (and do) build their own entrance facilities or obtain them from suppliers other than incumbents; it is therefore incorrect to say categorically, as the government does (at 5), that entrance facilities "are owned by incumbent LECs."

[13] In two footnotes in the *Triennial Review Remand Order*, the word "backhaul" appears in parenthetical quotations. *TRRO* ¶¶ 138 n.389, 141 n.396. Those references cannot be read to suggest that the FCC limited its impairment analysis to entrance facilities when used for backhaul. In fact, the analysis was not so limited, *see id.* ¶¶ 138-139, 141, no different from the *Local Competition Order* and *UNE Remand Order*, in which the FCC also assessed impairment with respect to both uses of entrance facilities. Moreover, a contrary reading of the order would mean that the FCC violated the D.C. Circuit's mandate in *USTA II*, *see* 359 F.3d at 586, by conducting an incomplete impairment analysis for entrance facilities.

review of the *Triennial Review Remand Order*, none challenged that rule.

B. Procedural History

1. Following the *Triennial Review Remand Order*, AT&T announced that it would cease fulfilling new orders for TELRIC-priced entrance facilities and would begin billing existing entrance facilities at rates in its state and federal tariffs.[14] Other incumbents did the same.

Competitors, however, asserted that incumbents were still required to provide entrance facilities at TELRIC rates, at least when competitors use those facilities to exchange traffic with incumbents. To support that assertion, competitors relied on paragraph 140 in the *Triennial Review Remand Order*:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based [i.e., TELRIC]

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[14] Following the *Triennial Review Order*, AT&T had sought to amend its interconnection agreements with competitors nationwide to implement the FCC's rulings in that order, a process the FCC required and expected could take nine months. *See TRO* ¶¶ 700-706. However, before the end of that nine-month period, the D.C. Circuit issued its *USTA II* decision vacating and remanding the *Triennial Review Order* in significant part. The FCC responded by ordering incumbents to continue providing UNEs on terms in existing interconnection agreements while it completed its proceeding on remand from *USTA II*. *See* Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, 19 FCC Rcd 16783, ¶¶ 1, 7 (2004) ("*TRRO NPRM*").

> rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO ¶ 140 (footnote omitted).

State commissions considered those competing contentions in arbitrating amendments to AT&T's (and other incumbents') existing interconnection agreements with competitors.[15] A number of state commissions rejected competitors' attempts to preserve TELRIC-priced access to entrance facilities. For example, the Ohio commission found that § 251(c)(2) requires an incumbent to "interconnect its network with . . . facilities and equipment" that are "provided by the [competitor], not leased from the [incumbent]" at TELRIC rates.[16]

Other state commissions, including the Michigan commission, accepted the competitors' contentions. In the order challenged here, the Michigan commission concluded that the FCC, in paragraph 140 of the

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[15] In those proceedings, state commissions also considered competitors' claims that a separate provision of the 1996 Act, 47 U.S.C. § 271, required incumbents to continue leasing at TELRIC rates various other elements the FCC had held should not be provided as UNEs. Although some state commissions accepted that claim, all five courts of appeals to consider the question rejected those arguments. *See, e.g., Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1116 (9th Cir. 2009) (collecting cases); *Illinois Bell II*, 548 F.3d at 612-13 (Posner, J.); *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 7-9 (Boudin, C.J.), *on denial of reh'g*, 509 F.3d 13 (1st Cir. 2007) (per curiam).

[16] Arbitration Award at 22-23, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 WL 3018712 (Ohio Pub. Utils. Comm'n Nov. 9, 2005), http://dis.puc.state.oh.us/TiffToPDf/LZAH5X8NU6JSB7R+.pdf.

Triennial Review Remand Order, made the "specific finding[]" that competitors "have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." App. 185a. The Michigan commission therefore ordered that AT&T's interconnection agreements with competitors, including petitioner Talk America, be amended to require AT&T to provide entrance facilities at TELRIC rates to comply with § 251(c)(2). App. 185a, 232a.

On November 30, 2005, the Michigan commission approved an amendment to AT&T's interconnection agreement with Talk America, along with identical amendments to AT&T's interconnection agreements with more than 40 other competitors.[17] That amendment provided in relevant part as follows:

> Entrance facilities . . . In accordance with Paragraph 140 of the TRRO, nothing in this Section 1.1 nor the FCC's finding of non-impairment with respect to entrance facilities alters [Talk America]'s right to obtain interconnection facilities (entrance facilities or dedicated transport) pursuant to Section 251(c)(2) of the Act or to obtain access to such facilities at the same rates for dedicated transport as set forth in the [UNE] Pricing Schedule.[18]

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[17] Order at 3, *Joint Requests for Commission Approval of Interconnection Agreements and Amendments*, Case Nos. U-11340 et al. (MPSC Nov. 30, 2005), http://efile.mpsc.state.mi.us/efile/docs/13569/0012.pdf.

[18] Joint Application, Ex. A at 6, *Request for Commission Approval of An Interconnection Agreement between Talk America Inc. and Michigan Bell Telephone Company*, Case No. U-13569 (MPSC filed Nov. 7, 2005), http://efile.mpsc.state.mi.us/efile/docs/13569/0011.pdf.

2. AT&T challenged the Michigan commission's order in federal district court. The court ruled that it was "not reasonable" to interpret paragraph 140 of the *Triennial Review Remand Order* to require incumbent LECs to provide entrance facilities at TELRIC rates pursuant to § 251(c)(2). App. 158a. The court read the FCC's order to "convey[] [its] finding . . . that entrance facilities should be offered competitively," not at TELRIC rates. *Id.*

3. The Michigan commission and three competitors, including Talk America, appealed. The Sixth Circuit affirmed in a 2-1 decision.

The court of appeals agreed with the district court that paragraph 140 of the *Triennial Review Remand Order* could not be read to impose on incumbents the obligation to provide competitors with entrance facilities at TELRIC rates. Instead, the court found that the "most plausible" reading of paragraph 140 is that, "if [a competitor] build[s] [its] own entrance facility, the [incumbent] must still let [the competitor] hook [that entrance facility] up to [the incumbent's] network (i.e., use its 'interconnection facility') at wholesale rates." App. 17a-18a. The court accordingly held that a competitor that "chooses to use [an incumbent's] entrance facility" -- rather than "build its own entrance facility," "rent someone else's," or "connect directly" to the incumbent's network without using an entrance facility — "must pay the rates determined by the [incumbent]" in its tariff, not TELRIC rates. App. 32a.

Thus, as the Sixth Circuit explained by way of an analogy to extension cords and electrical outlets, *see* App. 18a-21a, there is a critical difference between entrance facilities and the "interconnection facilities" that incumbents provide under § 251(c)(2) to accom-

modate interconnection with a competitor's facilities and equipment. The former span the entire physical distance between a competitor's switch and an incumbent's switch, which may "be very long," "even miles," if the competitor has elected to locate its switch far from the incumbent's. App. 3a. Interconnection facilities, in contrast, are the equipment *within* the incumbent's network (and in almost all cases within its central office buildings) to which the competitor's entrance facility attaches; that equipment can include, for example, a port on a frame connected to the incumbent's switch as well as a cross-connect cable attached to that frame. App. 19a-20a.[19]

The court of appeals rejected the Michigan commission's contrary reading of paragraph 140, holding that the interpretation "require[d] several assumptions, none of which is easily defended." App. 24a. In particular, the Michigan commission's interpretation presumed that the FCC had "used two separate terms" in paragraph 140 -- "'entrance facility' and 'interconnection facility' — to describe the exact same wire, without any explanation why." *Id.* The Michigan commission's interpretation also was based on an "unnatural reading" of the "phrase 'provide . . . interconnection *with* the [incumbent]'s network'" in § 251(c)(2) that had "no support in the statute." App. 28a (quoting 47 U.S.C. § 251(c)(2)) (omission in original). The better reading of that statutory phrase, the court found, was that "the [incumbent] is obligated"

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[19] A port is a socket where a cable attaches to a switch. A cross-connect cable is used to connect two other wires together — *e.g.*, to connect a competitor's entrance facility to a wire in an incumbent's central office. A port and a cross-connect cable are rough equivalents of the "wall outlet" and "surge protector" in the Sixth Circuit's analogy. App. 21a.

to "'make a plug-in available' *for* connection with the [competitor]'s facilities and equipment," not "to 'lease a physical facility (or wire)' *to* the [competitor]." *Id.*

The Sixth Circuit acknowledged that its holding conflicted with decisions of the Seventh and Eighth Circuits, which had held that, when the FCC referred in paragraph 140 of the *Triennial Review Remand Order* to the "right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2)," the agency actually "said . . . that [incumbents] must allow use of *entrance facilities* for interconnection" at TELRIC rates. *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir. 2008) ("*Illinois Bell I*") (emphases added); *see Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-84 (8th Cir. 2008) (following *Illinois Bell I*), *cert. denied*, 129 S. Ct. 971 (2009). The court below did "not find th[o]se two cases persuasive," because their "'reasoning' is entirely circular" as each "assum[ed] the very question to be decided": namely, that "interconnection facilities" and "entrance facilities" are the same thing. App. 28a-31a.

The Sixth Circuit also refused to defer to the position of the FCC in an *amicus* brief, finding that the FCC's position "is so plainly erroneous" that it could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." App. 9a-10a n.6. In that *amicus* brief, the FCC urged the Sixth Circuit to reverse the district court, asserting that the district court had improperly treated the "FCC's statement in paragraph 140" as "a mere 'explanatory comment' without legal force." App. 129a & n.32. But the FCC conceded in its brief that, when it stated in the *Triennial Review Remand Order* that it did "not alter

the right of competitive LECs to obtain *interconnection* facilities pursuant to section 251(c)(2)." *TRRO* ¶ 140 (emphasis added), the FCC "did not specifically define what it meant by the term 'interconnection facilities.'" Gov't C.A. Br. 20 (App. 137a-138a).

The Michigan commission and the competitor appellants filed petitions for rehearing, which the Sixth Circuit denied. App. 90a-91a.

SUMMARY OF ARGUMENT

A. Section 251(c)(2) does not obligate incumbents to lease entrance facilities to competitors. The statutory text provides that an incumbent has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent's] network" at a "point within" the incumbent's network. 47 U.S.C. § 251(c)(2)(B). An incumbent's obligation under § 251(c)(2) is thus to enable competitors to connect *their own* facilities and equipment to the incumbent's network at an interconnection point. An incumbent is not required to lease to a competitor the transport facilities that the competitor will use to carry traffic from its network to the point within the incumbent's network at which interconnection occurs.

The 1996 Act's structure reinforces that conclusion. As this Court has recognized in multiple cases, § 251(c) imposes on incumbents multiple, distinct duties to assist competitors in entering the local telecommunications marketplace. Unlike § 251(c)(2), § 251(c)(3) explicitly imposes on incumbents an obligation to lease facilities to a competitor. The contrast between the statutory language addressing unbundling and interconnection confirms that § 251(c)(2) does not require incumbents to lease to competitors

the transport facilities that competitors use to exchange traffic with incumbents.

The government concedes, and petitioners do not disagree, that "[t]he FCC's interconnection rules, which were adopted in 1996, do not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)." Gov't Br. 22 n.6. Instead, those regulations confirm what the Act's text and structure demonstrate: § 251(c)(2) does not impose on incumbents an obligation to lease entrance facilities. By regulation, the FCC has defined "interconnection" to exclude "transport," 47 C.F.R. § 51.5, which further undermines the notion that § 251(c)(2)'s duty to "provide . . . interconnection" includes the duty to lease a transport facility, such as an entrance facility. The FCC's interconnection regulations also specify certain points within an incumbent's network at which interconnection occurs – notably, each of those points is within the incumbent's central office.

B. In defending the Michigan commission's mandate, petitioners rely on misinterpretations of a few isolated sentences in the FCC's *Triennial Review* orders, as well as the government's *amicus* briefs. That reliance is unavailing for three reasons.

First, there is no FCC interpretation of § 251(c)(2) that is eligible for deference under *Chevron*. The FCC statements on which petitioners and the government rely are, at most, informal statements of policy, not legislative rules; consequently, under this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), no deference could be afforded to those statements (regardless of their proper interpretation).

Second, no deference to the government's views is warranted under *Auer*. Neither the FCC's orders nor the government's *amicus* briefs purport to interpret any specific FCC regulation to require entrance facilities under § 251(c)(2). Nor could the FCC have used an *amicus* brief to amend its interconnection regulations to impose such an obligation. The government's *amicus* briefs also cannot be treated as the FCC's fair and considered judgment on the issues in this case, because those two briefs offer shifting interpretations of the text of the *Triennial Review* orders.

Third, and in all events, the sentences in the FCC's orders on which petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2). Rather, those statements simply reiterate the FCC's long-held view that incumbents must accommodate interconnection with a competitor's facilities and equipment. That obligation to accommodate interconnection does not include a duty to lease a transport facility to a competitor.

C. Requiring incumbents such as AT&T to provide TELRIC-priced entrance facilities to competitors also conflicts with the 1996 Act's policy of encouraging facilities-based competition. Enabling competitors' continued dependence on non-bottleneck facilities leased from incumbents at artificially low prices discourages them from building or obtaining their own facilities. Neither petitioners nor their *amici* even attempt to explain why competitors need access to entrance facilities at TELRIC prices; nor could they, in light of the FCC's findings that competitors can — and do — build their own entrance facilities and obtain them from alternative providers.

ARGUMENT

AT&T IS NOT REQUIRED TO PROVIDE ENTRANCE FACILITIES TO COMPLY WITH § 251(c)(2)

A. The Sixth Circuit Correctly Held That Neither § 251(c)(2) nor the FCC's Implementing Rules or Orders Obligate Incumbents To Provide TELRIC-Priced Entrance Facilities to Competitors

1. Section 251(c)(2)'s text and the 1996 Act's structure demonstrate that § 251(c)(2) requires an incumbent to provide interconnection, not a transport facility spanning the distance between the incumbent's and competitors' switches. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute.").

a. Section 251(c)(2) requires an incumbent to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2). Nothing in that text suggests that the incumbent's obligation to "provide . . . interconnection" includes the duty to lease a facility spanning the entire physical distance (miles, in some cases) between the competitor's network and its own. On the contrary, the only "facilities and equipment" to which the statute refers are those "*of* any requesting telecommunications carrier." *Id.* (emphasis added). The incumbent's duty is to "provide . . . interconnection" "*for*" the competitor's facilities and equipment at a "*point within*" the incumbent's network. *Id.* (emphases

added).[20] Put differently, § 251(c)(2) obligates incumbents to enable competitors to connect their facilities and equipment to a point within the incumbent's network. It does not require the leasing of facilities to transport traffic from the competitor's network to that interconnection point.

This Court recognized the limited nature of the § 251(c)(2) duty in *Verizon*, in the course of rejecting a challenge to an FCC regulation that required an incumbent, "[u]pon request," "to combine unbundled network elements with elements possessed by the requesting telecommunications carrier." 47 C.F.R. § 51.315(d) (1997). As the Court understood the regulation, it required incumbents only "'to combine'" a "competitive carrier's element with the incumbent's network," such as by providing a cross-connect cable, and it applied only "when the entrant is unable to do the job itself." 535 U.S. at 532, 535 (quoting 47 C.F.R. § 51.315(d) (1997)); *see Local Competition Order* ¶¶ 294 & n.620, 386.

In upholding the regulation, the Court explained that the regulation "appears to be nothing more than an element-to-element version of the incumbents' statutory duty 'to provide, for the facilities and equipment of any requesting . . . carrier, interconnection with the local exchange carrier's network.'" 535 U.S. at 538 (quoting 47 U.S.C. § 251(c)(2)) (ellipsis added in *Verizon*). It found further that "it is hard

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[20] Neither petitioners nor the government address these aspects of § 251(c)(2)'s text. The California Public Utilities Commission ("CPUC") argues (at 13-15) that, to provide "interconnection" for a competitor's facilities at a point within its network, an incumbent must provide a transport facility extending (potentially) many miles from the interconnection point to a point within the competitor's network. Petitioners and the government rightly do not advance that absurd reading of the text.

to see how this rule is any less reasonable than § 251(c)(2), which imposes a statutory duty to interconnect." *Id.* The Court's description of § 251(c)(2) supports the natural reading of that provision's text, under which the interconnection duty is about attaching networks, not leasing a transport facility spanning the potentially miles-long space between two carriers' networks.

b. The structure of the 1996 Act further reinforces the conclusion that § 251(c)(2) does not require incumbents to provide the transport facilities that link competitors' switches to the point of interconnection within the incumbent's network. The 1996 Act sets up three different methods for new entry by competitors: interconnection under § 251(c)(2), unbundling under § 251(c)(3), and resale under § 251(c)(4). *See supra* pp. 3-4. This Court's cases have recognized the structural differences among those provisions, with § 251(c)(3) being the only provision that requires incumbents to lease facilities to competitors and § 251(c)(2) being limited to providing interconnection for *the competitor's* facilities.

As the Court explained in *Verizon*, when a competitor "decide[s] to engage in pure facilities-based competition," § 251(c)(2) "obligates the incumbent to 'interconnect' the competitor's facilities to its own network," whereas § 251(c)(4) sits "[a]t the other end of the spectrum" and permits competitors "to skip construction" entirely and instead "simply . . . resell" the incumbent's service. 535 U.S. at 491. Section 251(c)(3) lies "[b]etween these extremes"; it allows a competitor "to lease certain of an incumbent's 'network elements.'" *Id.* at 491-92. The Court described the same three-part structure in *Iowa Utilities Board*:

> [A] requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network "on an unbundled basis"; and it can interconnect *its own facilities* with the incumbent's network.

525 U.S. at 371 (emphasis added).

Like the Court, the government's briefs in *Verizon* and *Iowa Utilities Board* articulated the same distinction between paragraphs (c)(2) and (c)(3). *But cf.* Gov't Br. 2 (asserting here that § 251(c) creates "overlapping" duties). In *Verizon*, the government distinguished § 251(c)(3), which "entitles a new entrant to gain 'access' to . . . an incumbent's 'network elements,'" from § 251(c)(2), which "permits new entrants to 'interconnect' *their own facilities* with those in the incumbent's network." U.S. Br. 3-4, *Verizon* (emphasis added). In *Iowa Utilities Board*, the government similarly described § 251(c)(2) as "requir[ing] incumbent LECs to 'interconnect' their networks with those of other carriers," whereas § 251(c)(3) "permits new entrants . . . to lease from incumbents whatever combinations of elements they need . . . to provide telecommunications services to their customers." U.S. Br. 5-6, *Iowa Utils. Bd.* There, the government also emphasized the "*marked contrast*" between § 251(c)(2) and (c)(3) and observed that paragraph (c)(2) "obligates incumbents to 'interconnect' with 'the facilities and equipment' of other carriers, language that does not appear in Section 251(c)(3)." U.S. Reply Br. 27, *Iowa Utils. Bd.* (emphasis added).

Thus, as this Court and the government (in prior cases) have made clear, only § 251(c)(3), and not

§ 251(c)(2) or (c)(4), requires incumbents to provide a competitor with "access to network elements." The contrast between § 251(c)(3), which expressly imposes an obligation to lease facilities, and § 251(c)(2), which requires only "interconnection" "for" *the competitor's facilities* at a "point within" the incumbent's network, reinforces the conclusion that § 251(c)(2) does not obligate incumbents to lease entrance facilities to competitors at TELRIC rates. Section 251(c)(2)(D), which states that the required interconnection shall be provided at rates and on terms "in accordance with . . . the requirements of this section," further bolsters the conclusion that only § 251(c)(3) creates a facilities-leasing obligation: reading § 251(c)(2) to require leasing of facilities not required by § 251(c)(3) would not be "in accordance with" the requirements of § 251.

Section 252(d)(1), which contains the pricing standard for both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3), confirms that only the latter imposes a duty to lease facilities. With respect to the unbundling duty, § 252(d)(1) governs the "rate for [the] network elements" that incumbents must lease to competitors. 47 U.S.C. § 252(d)(1). In contrast, with respect to the interconnection duty, § 252(d)(1) applies to the "rate for the interconnection *of* facilities and equipment." *Id.* (emphasis added). If Congress had meant for § 251(c)(2) to require incumbents to lease facilities and equipment to other carriers, as § 251(c)(3) requires, it would instead have established a pricing standard "for the facilities and equipment used for interconnection," just as it established one "for the network elements" that must be unbundled. Here, again, the different language Congress used confirms

that the interconnection obligation does not include a requirement to lease entrance facilities.

Finally, § 251(a)(1), which imposes an interconnection duty on all telecommunications carriers, also supports AT&T's interpretation of § 251(c)(2). Section 251(a)(1) requires all carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." *Id.* § 251(a)(1). The two interconnection provisions thus contain parallel language: both require interconnection with "the facilities and equipment" of another carrier, and, as construed by the FCC, "interconnect" under § 251(a)(1) has the same meaning as "interconnection" under § 251(c)(2).[21] Unlike § 251(c)(2), however, § 251(a)(1) can be satisfied through "indirect[ ]" interconnection, *see Local Competition Order* ¶ 997 — that is, an interconnection arrangement in which two carriers' networks are both connected to the network of a third carrier, but not to each other's. It is thus plain that the interconnection duty under § 251(a)(1) does not include a requirement to lease facilities, and there is no language in § 251(c)(2) that would distinguish it from § 251(a)(1) in that regard.

2. In its regulations implementing § 251(c)(2), the FCC has never attempted to impose an obligation on incumbents to lease entrance facilities to competitors at TELRIC rates, a point the government correctly concedes (at 22 n.6). On the contrary, the FCC's

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[21] *See* Memorandum Opinion and Order, *Total Telecomms. Servs., Inc. v. AT&T Corp.*, 16 FCC Rcd 5726, ¶ 25 (2001) ("We find nothing in the statutory scheme to suggest that the term 'interconnection' has one meaning in section 251(a) and a different meaning in section 251(c)(2)."). On review, the D.C. Circuit upheld the FCC's conclusion on that point. *See AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003).

interconnection regulations confirm what the Act's text and structure demonstrate: § 251(c)(2) does not impose on incumbents an obligation to lease entrance facilities.

a. In its first order implementing the Act, the 1996 *Local Competition Order*, the FCC defined "interconnection" under § 251(c)(2) as "the linking of two networks for the mutual exchange of traffic." 11 FCC Rcd at 16199 (promulgating 47 C.F.R. § 51.5). Relying on the 1996 Act's structure, the FCC specifically excluded from that definition "the *transport* and termination of traffic," precisely because it is addressed in a different statutory provision. *Id.* (emphasis added); *id.* ¶ 176.

In defending the FCC's definition of interconnection in the court of appeals, the government argued that its definition of interconnection ensures that paragraphs (c)(2) and (c)(3) serve independent purposes. As the government explained, "[i]f section 251(c)(2) interconnection included routing and transmission, section 251(c)(2) would overlap with other subsections that describe a duty to route and transmit or *a duty to lease facilities that will be used for routing and transmission*. . . . See especially subsections 251(b)(5) and *251(c)(3)*." U.S. Br. 13 & n.17, *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("U.S. CompTel Br.") (emphases added), *available at* http://www.khhte.com/public/US_CompTel_Br.pdf.[22] The FCC had similarly explained in the *Local Competition Order* that it is paragraph (c)(3), not (c)(2), that allows competitors "to substi-

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[22] The FCC later explained to the D.C. Circuit that its exclusion of transport from the definition of interconnection is "without qualification" and is not limited to the "compensation" due for individual calls under § 251(b)(5). U.S. Br. 34, *AT&T Corp. v. FCC*.

tute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete," which include (among others) entrance facilities. *Local Competition Order* ¶ 172.

Neither petitioners nor the government explain how § 251(c)(2)'s duty to "provide . . . interconnection" could include a requirement to furnish a transport facility spanning the distance between two networks, when "interconnection" expressly excludes "transport." 47 C.F.R. § 51.5. The government acknowledges the exclusion only in passing, while suggesting (at 3 n.1) that competitors pay incumbents, under § 251(b)(5), for their use of entrance facilities when sending calls to the incumbents' customers. Not so. The FCC's rules implementing the reciprocal-compensation duty in § 251(b)(5) require payment only "from the interconnection point" to the point of "delivery" to the called party. 47 C.F.R. § 51.701(c)-(d). The entrance facility runs between the competitor's switch serving the calling party and the point of interconnection on the incumbent's network; therefore, a competitor's payments under § 251(b)(5) do not cover its use of the entrance facility.

The Michigan commission concedes (at 28 n.13) that "[e]ntrance facilities are a 'type' of dedicated transport," but attempts to reconcile its concession with § 51.5 by asserting (at 26 n.12 & 28 n.13) that entrance facilities are "transmission facilities" (not transport) when used to exchange traffic with the incumbent. Nothing in § 51.5 suggests that "transmission facilities" are distinct from "transport"; in fact, as shown above, the FCC defended its definition of interconnection on the ground that it is § 251(c)(3), not § 251(c)(2), that imposes "a duty to lease facilities that will be used for . . . transmission." U.S. Comp-

Tel Br. 13; *see Local Competition Order* ¶ 439 (using the terms interchangeably). For its part, Talk America simply ignores the FCC's exclusion of "transport" from its definition of "interconnection."

b. The interconnection regulations promulgated in the *Local Competition Order* identified certain "point[s] within" the incumbent's network at which interconnection would occur. 47 U.S.C. § 251(c)(2). Those points include ports on switches and cross-connect cables in incumbents' central offices. *See Local Competition Order* ¶¶ 209-212; 47 C.F.R. § 51.305(a)(2). Although the FCC's list is not exclusive, all of the points of interconnection it identified are notably *inside* incumbents' central offices. *See* 47 C.F.R. § 51.305(a)(2).

The FCC also specified certain things that incumbents must do to accommodate interconnection at those points. Because incumbents' networks "were not designed to accommodate third-party interconnection . . . at all or even most points within the network," the FCC required incumbents, "at least to some extent, to adapt their facilities to interconnection." *Local Competition Order* ¶ 202; *see id.* ¶ 198 (FCC requires "modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection"). But the agency nowhere suggested that the incumbents' obligation "to *adapt* their facilities" to enable interconnection included an obligation to *lease* to competitors transport facilities spanning the distance between networks.

Consistent with the FCC's order, AT&T does a number of things within its central offices (at TELRIC prices) — such as providing cross-connect cables, conduits, riser space, and ports — to accommodate the interconnection of competitors' entrance

facilities.[23] AT&T thus does not argue that the § 251(c)(2) obligation is a purely "passive" duty; nor did the Sixth Circuit so hold. *See* App. 19a.

c. In the *Local Competition Order*, the FCC also concluded that § 251(c)(6), which permits a competitor to "collocat[e]" (or install) its equipment in an incumbent's central office, did not identify the only method of interconnection that incumbents must provide. *See Local Competition Order* ¶¶ 550-551. The FCC promulgated a regulation requiring incumbents to provide "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a). Other than the statutory collocation duty, however, the FCC identified only one technically feasible method of interconnection: "[m]eet point interconnection arrangements." *Id.* § 51.321(b)(2). The FCC's treatment of meet-point arrangements is instructive in three respects.

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[23] *See* AT&T California Br. 35, *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. 2010) (figure depicting steps AT&T undertakes within its central offices to comply with § 251(c)(2) to interconnect its network with a competitor-provided entrance facility). In contrast, the diagram in the Michigan commission's brief (at 23), which it copied from the CPUC's Ninth Circuit brief in *Pacific Bell* (*see* CPUC Br. 5 & App. 1), has numerous flaws. Among them, it shows separate cables used for backhauling and exchanging traffic, when (as Sprint concedes (at 9)) circuits performing each task can ride a single fiber-optic cable; the diagram also depicts the entrance facilities as covering a relatively short distance, when in fact the competitor may elect to locate its switch miles from the incumbent central office containing its chosen point of interconnection. No one rebuts the deficiencies AT&T identified in the diagram the Ninth Circuit created. *See Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 842 (9th Cir. 2010), *petition for cert. pending*, No. 10-838 (filed Dec. 23, 2010), Br. in Opp. 2 n.4.

First, "[i]n a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553. Thus, the competitor must provide its own facilities — and bear the cost of those facilities — to reach the meet point. *See id.* Nothing in the FCC's treatment of meet-point arrangements suggests that § 251(c)(2) allows competitors to insist that incumbents lease to them, at TELRIC rates, the transport facility between the competitor's switch and the meet point. But that is exactly what follows from petitioners' theory, because competitors use that transport facility "for the purpose of exchanging traffic with incumbent LECs." *Id.*

Second, the FCC made clear that the incumbent's obligation to engage in "some build out of facilities," if necessary to facilitate a meet-point arrangement, is "limited" to a "reasonable accommodation of interconnection." *Id.* Although the FCC left it to state commissions to determine the maximum "distance from an incumbent LEC's premises that an incumbent should be required to build out facilities," it never indicated that the incumbent might be required to build the entire facility extending between the two carriers' networks. *Id.* The FCC's Wireline Competition Bureau later rejected a competitor's effort to require an incumbent to "build[] new facilities all the way to [the competitor's] central office."[24]

Third, the FCC also held that, in a meet-point arrangement, the "'point' of interconnection for pur-

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[24] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶ 134 (Chief, Wireline Comp. Bur. 2002) ("FCC Staff Order").

poses of section[] 251(c)(2)" would not be at the meet point outside the central office (where the two carriers' facilities actually connect), but instead would remain inside the incumbent's central office, "*e.g.*, [on its] main distribution frame, [or the] trunk-side of the switch." *Local Competition Order* ¶ 553. The FCC thus recognized the conflict between its decision to require incumbents to provide even these "limited" facilities outside their central offices and the text of § 251(c)(2), which requires that the point of interconnection remain "within" the incumbent's local network.[25]

B. Petitioners' Reliance on the *Triennial Review* Orders and the Government's *Amicus* Briefs Is Misplaced

The government's *amicus* briefs, which purport to interpret a few sentences in the *Triennial Review* orders, cannot bear the essentially dispositive weight that petitioners place on them. On the contrary, the government's position is erroneous, and entitled to no deference, for three reasons.

First, no deference is warranted under *Chevron* because none of the FCC statements on which petitioners and the government rely satisfies the standard of formality prescribed in *Mead* and *Christensen*. Second, no deference is warranted under *Auer* because neither the FCC's orders nor the government's *amicus* briefs purport to interpret any specific FCC regulation to require entrance facilities under § 251(c)(2); nor could the FCC have used an interpretive rule (or *amicus* brief) to add such an obligation to its interconnection regulations. Third, and in all events, the sentences in the FCC's orders on which

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[25] The lawfulness of the FCC's meet-point rule was not tested in the courts of appeals.

petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2). Instead, the only permissible reading of those statements is that they reaffirm that incumbents must engage in the same limited network modifications, to accommodate interconnection with a competitor's facilities and equipment, that the FCC had long interpreted § 251(c)(2) to require.

1. *Chevron* deference is not warranted

Petitioners and the government principally seek to ground the supposed obligation to provide TELRIC-priced entrance facilities under § 251(c)(2) on a few sentences in the FCC's *Triennial Review* orders.[26] They rely on the FCC's statement in the *Triennial Review Order* that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *TRO* ¶ 366 (first alteration in original). They also rely on a two-sentence paragraph from the *Triennial Review Remand Order* in which the FCC stated that its "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)" and that competitors "will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *TRRO* ¶ 140.

To the extent those sentences are read as interpreting § 251(c)(2) — despite the FCC's express assurances that it was "not alter[ing]" its interpretation

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[26] *See* App. 185a; MPSC Br. 11-13; Talk Am. Br. 25-27; Gov't Br. 16, 22 n.6.

of that section — they are not eligible for *Chevron* deference. In determining whether an agency's statutory interpretation is eligible for deference under *Chevron*, this Court evaluates the circumstances surrounding the issuance of the statement to determine whether Congress would have intended for such a statement to carry the force of law. *See Mead*, 533 U.S. at 229-31. Although not dispositive, *see id.* at 230-31, the paradigmatic example of agency action "meriting *Chevron* treatment" is a "process of rulemaking . . . that produces regulations," *id.* at 229. On the other end of the continuum, when an agency acts through less formal means, such as "opinion letters," "policy statements, agency manuals, and enforcement guidelines," it cannot claim "*Chevron*-style deference." *Christensen*, 529 U.S. at 587; *see Mead*, 533 U.S. at 231-34 (tariff classification rulings by the Customs Service, though authorized by statute, "are beyond the *Chevron* pale").

Here, although the government makes the sweeping claim (at 31) that *everything* in the *Triennial Review* orders is a "legislative act[]," the specific FCC statements on which petitioners and the government rely lack the necessary formality under *Mead* and *Christensen*. Indeed, the FCC did not even purport to exercise its rulemaking authority with respect to those statements. The notices of proposed rulemaking that preceded the *Triennial Review* orders did not even cite § 251(c)(2), let alone give any indication that the agency was contemplating promulgating binding rules implementing that provision.[27] Nor did the orders promulgate any new interconnection regu-

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[27] *See* Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001); *TRRO NPRM*.

lation or amend any existing interconnection regulations (with one exception not relevant here[28]). *See TRO*, 18 FCC Rcd at 17469-503 (appendix reproducing regulations promulgated in the *TRO*); *TRRO*, 20 FCC Rcd at 2677-84 (same, *TRRO*).

The orders themselves contain nothing putting parties on notice that the FCC had announced a new legal obligation that could or should have been challenged on judicial review. On the contrary, in the sentences on which petitioners and the government rely, the agency expressly reassured parties that it did "not alter" its prior interpretation of § 251(c)(2). *TRO* ¶ 366; *TRRO* ¶ 140.[29] The orders also make no effort to reconcile a requirement to provide TELRIC-priced entrance facilities under § 251(c)(2) with the text, structure, or policy of the Act. *See id.* Nor did the Commission attempt to square such an obligation with its regulation defining "interconnection" to exclude "the transport . . . of traffic," 47 C.F.R. § 51.5, along with any "duty to lease facilities that will be used for routing and transmission" of traffic between networks, U.S. CompTel Br. 13; *see supra* p. 26.

It also does not help — and in fact hurts — the government's case to point out, as it does (at 31), that

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[28] In response to *Iowa Utilities Board v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997), the FCC in the *Triennial Review Order* amended 47 C.F.R. § 51.305 to remove a paragraph requiring incumbents to provide interconnection that "is superior in quality" to what the incumbent provides to itself (47 C.F.R. § 51.305(a)(4) (2003)). *See TRO* ¶¶ 15, 630, 633 n.1917, App. B.

[29] For that reason, the government rightly does not defend the Ninth Circuit's assertion that incumbents such as AT&T had to seek judicial review of the supposed conclusion in the *Triennial Review Order* that TELRIC-priced entrance facilities must be provided under § 251(c)(2). *See Pacific Bell*, 621 F.3d at 847.

a summary of the *Triennial Review Remand Order* was published in the Federal Register. Such a summary was also published for the *Triennial Review Order*. Neither summary mentioned § 251(c)(2). To make matters worse for the government, both summaries referred to the orders' determinations that entrance facilities would no longer be available under § 251(c)(3) *without mentioning* the qualifying language that the government now claims created a legal obligation to provide those facilities under § 251(c)(2). *See* 70 Fed. Reg. 8940, 8941 (Feb. 24, 2005); 68 Fed. Reg. 52,276, 52,280 (Sept. 2, 2003); *see also* 5 U.S.C. § 552(a)(1)(D)-(E) (requiring Federal Register publication of "substantive rules" and "amendment[s]" thereto).

Considering all of those deficiencies, "[i]t is difficult, in fact, to see in the agency practice itself any indication that [the FCC] ever set out with a lawmaking pretense in mind when it" made the remarks on which petitioners and the government rely. *Mead*, 533 U.S. at 233. Certainly, there is no reason to believe that Congress would have intended for the FCC to issue "rulings with the force of law" (*id.* at 231-32) in the manner in which it proceeded here.

To be sure, the FCC can issue an interpretation in a rulemaking order that is entitled to *Chevron* deference, even if not codified in the Code of Federal Regulations. *Cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). But where, as here, the agency in an order *affirmatively disclaims* any intention to alter its existing interpretation of a statute, it cannot assert — in an *amicus* brief years after the fact — that it actually promulgated a new legislative rule interpreting the statute. *Cf. Long Island Care at Home*,

Ltd. v. Coke, 551 U.S. 158, 170-71 (2007) (when an agency's interpretation creates "unfair surprise," its claim for deference is weakened).

2. *Auer* deference is not warranted

Under this Court's decision in *Auer*, an agency's "interpretation" of its "own regulation[]" is not entitled to deference if the interpretation is "inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment on the matter in question." 519 U.S. at 461-62 (internal quotation marks omitted).

a. Here, the threshold predicate for *Auer* deference — an agency interpretation of a regulation — is lacking. In neither the passages from the *Triennial Review* orders on which petitioners and the government rely nor the government's *amicus* briefs in this case has the FCC ever attempted to interpret a specific Commission interconnection regulation to require incumbents to provide entrance facilities. Indeed, the pertinent passages of the *Triennial Review* orders do not even cite any of the FCC's interconnection regulations, let alone purport to interpret any of them. *See TRO* ¶ 366; *TRRO* ¶ 140. This case is thus fundamentally different from cases in which this Court has considered whether to give deference to an agency's construction of specific ambiguous language in one of its regulations. *See, e.g.*, *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-81 & n.8 (2011) (deferring to agency's interpretation of the ambiguous phrase "[c]hange in terms" in Regulation Z, where the agency advanced a "consistent" inter-

pretation of that phrase in *amicus* briefs before the court of appeals and this Court).[30]

b. Even if the FCC had purported in the *Triennial Review* orders or its *amicus* briefs to interpret 47 C.F.R. § 51.321(a), which requires incumbents to provide "any technically feasible method of obtaining interconnection . . . at a particular point," its interpretation would not be entitled to *Auer* deference. As the government concedes (at 22 n.6), neither this rule (nor any other) "expressly require[s] incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)."[31] Instead, the FCC has specified only two required "methods of obtaining interconnection": (i) "collocation" of equipment inside the incumbent's central offices, and (ii) meet-point arrangements. 47 C.F.R. § 51.321(b).

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[30] The term "interconnection facility" appears only once in the FCC's regulations implementing § 251(c)(2). *See* 47 C.F.R. § 51.305(a)(3) ("requir[ing] an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network"). The government does not rely on this regulation, though Talk America (at 5) cites it in passing. The rule, by its terms, does not require leasing of facilities.

[31] The Michigan commission (at 31) and Talk America (at 13-14, 33), though not the government, cite 47 C.F.R. § 51.305(f), which requires incumbents to "provide two-way trunking upon request." A "trunk" is a circuit, which rides on a transport facility. *See id.* pt. 36, App. A. The Commission promulgated this rule out of concern that a competitor might not have "a sufficient amount of traffic to justify separate one-way trunks" and required the incumbent to "accommodate two-way trunking" for such a competitor — that is, to configure its network so that traffic may be sent and received over a competitor's single trunk. *Local Competition Order* ¶ 219. Section 51.305(f) thus does not require the incumbent to lease facilities to a competitor.

The FCC cannot add to this list except by amending the regulation. As this Court has recognized and the court below explained, deference to an agency is unwarranted when the agency seeks, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588; *see* App. 10a n.6. Any other result would permit an agency to make an end run around the notice-and-comment rulemaking process. *See United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004) (Boudin, C.J.) ("[W]here, as here, the [agency's] interpretation has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment — is the proper course.").

Thus, courts have rejected agency efforts to impose new mandates under the guise of "interpreting" open-ended regulatory language. *See Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (rejecting Secretary of Education's attempt to impose a new requirement for eligibility for funding based on regulations providing that recipients must meet "any additional conditions"); *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (rejecting Park Service effort to impose restrictions on a demonstrator pursuant to a Park Service regulation that listed certain restrictions and purported to authorize the Service to impose "additional reasonable conditions"); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324-25 (3d Cir. 1987) (Becker, J.); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 452 (5th ed. 2010).

Moreover, contrary to the government's assertion (at 24-25), the incumbent's obligation to participate in meet-point arrangements is qualitatively different

from the facilities-leasing obligation the Michigan commission imposed.[32] In a meet-point arrangement, the competitor "pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553. The competitor thus has the incentive to "locate [its] switch[] close to the incumbent LEC's central office, minimizing the length and cost" of its portion of the meet-point facility. *TRRO* ¶ 138. And the incumbent's obligation to provide facilities to the meet point is "limited" to that "required [for a] reasonable accommodation of interconnection." *Local Competition Order* ¶ 553. In contrast, the Michigan commission's order shifts to the incumbent all of the actual costs of establishing the entrance facility, while virtually eliminating the competitor's incentive to minimize those costs: under TELRIC, the competitor pays only the "hypothetical" cost of a "most efficient" entrance facility, "untethered to" the cost of the "actual network element" the incumbent must provide. *Verizon*, 535 U.S. at 501. The obligation the Michigan commission imposed, therefore, is anything but "limited" and "reasonable." *Local Competition Order* ¶ 553. Indeed, in Talk America's view (at 29), it is "absolute."

c. A final impediment to granting *Auer* deference is that the government's *amicus* brief in this Court cannot be said to "reflect the [FCC]'s fair and considered judgment on" the interpretation of the *Triennial Review* orders. *Auer*, 519 U.S. at 462. In this Court, the government asserts (at 22 n.6) that *both* the

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[32] As the government concedes (at 25 n.7), the FCC's staff rejected a competitor's attempt to use the meet-point obligation to require an incumbent to provide a transport facility spanning the entire physical distance between an incumbent's and a competitor's network. *See also supra* p. 30 & n.24.

Triennial Review Order and the *Triennial Review Remand Order* "clarif[ied] . . . that Section 251(c)(2) gives competitive LECs a right of access to [entrance] facilities for interconnection" at TELRIC rates. And it claims (at 18) that "entrance facilities are 'interconnection facilities,' as that term is used in the *Triennial Review Remand Order*."

But the government made no such claims in its brief in the Sixth Circuit. On the contrary, it discussed the *Triennial Review Order* only in passing and did not contend that this order adopted a rule requiring incumbents to provide entrance facilities. *See* Gov't C.A. Br. 17, 19 (App. 134a, 137a). The FCC also conceded that it "did not specifically define what it meant by the term 'interconnection facilities'" in paragraph 140 of the *Triennial Review Remand Order*. *Id.* at 20 (App. 138a).

The government offers no explanation for why it discovered only in preparing its brief in this Court that the references to "facilities" in the *Triennial Review Order* and "interconnection facilities" in the *Triennial Review Remand Order* in fact meant "entrance facilities." That unexplained inconsistency precludes treating the government's current assertions as the agency's "fair and considered judgment" and validates the court of appeals' refusal to defer to the government's unpersuasive *amicus* brief in that court. *Cf. Chase Bank*, 131 S. Ct. at 881 n.8 (noting that agency's brief in this Court was "consistent with" its brief in the court of appeals).[33]

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[33] There also is no indication that the full Commission, which is a multi-member body, approved the contents of the government's *amicus* brief in this Court or in the court of appeals. The briefs presumably reflect, at most, the views of the FCC Chairman and his staff. *Cf. Sprint Nextel Corp. v. FCC*, 508 F.3d

3. Petitioners and the government erroneously interpret the *Triennial Review* orders

In all events, irrespective of whether this Court applies a deferential standard, the few sentences in the *Triennial Review* orders on which petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2).

First, as discussed above, the FCC explicitly stated in both orders that it did "not alter" its prior interpretation of § 251(c)(2). *TRO* ¶ 366; *TRRO* ¶ 140. Nor did the FCC mention § 251(c)(2) in its notices of proposed rulemaking or its summaries of those orders in the Federal Register. *See supra* pp. 33-35. And the government concedes (at 22 n.6) that, before the *Triennial Review Order*, the FCC had never interpreted § 251(c)(2) to impose an obligation to provide TELRIC-priced entrance facilities under § 251(c)(2). These facts fatally undermine the government's effort to read the statements in the *Triennial Review* orders as having for the first time interpreted § 251(c)(2) to require entrance facilities.

The government seeks (at 22 n.6) to explain away the absence of any pre-2003 rule or order requiring entrance facilities under § 251(c)(2) by claiming that the question whether competitors could obtain entrance facilities under that provision was not salient while the FCC required unbundling of entrance facilities under § 251(c)(3). But that does not explain why no competitor even *argued* the point before

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1129, 1132 (D.C. Cir. 2007) (agreeing with the FCC that, because "[t]he Commission . . . acts by majority vote," "the Commissioners' individual statements . . . are not institutional Commission actions"). That further undermines the government's deference claim.

then if, as petitioners now claim, § 251(c)(2) provided a straightforward way to obtain TELRIC-priced entrance facilities without regard to the statutory impairment standard — a subject of "an ongoing, decade-long dispute," *Covad Communications Co. v. FCC*, 450 F.3d 528, 532-33 (D.C. Cir. 2006). Regardless, the important and controlling point is that, in both *Triennial Review* orders, the FCC denied articulating a new interpretation of § 251(c)(2), and it admittedly had never previously interpreted § 251(c)(2) to require entrance facilities.

Second, neither order actually states that incumbents must provide "*entrance* facilities" under § 251(c)(2). Instead, those orders refer to "facilities" (*TRO* ¶ 366) or "interconnection facilities" (*TRRO* ¶ 140). Neither petitioners nor the government offer a plausible explanation for why the FCC did not say "entrance facilities," a phrase it used repeatedly in the same passages in each order, if that is what it in fact meant. *See* App. 24a.[34] Indeed, it was not until the government's *amicus* brief in this Court that the government first asserted (at 16) that the *Triennial Review* orders "use the term 'interconnection facility' to refer to an entrance facility that is being used for

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[34] Talk America (at 36), though not the government, cites a statement in a 2002 FCC staff order that certain "'entrance facilities' are interconnection facilities." FCC Staff Order ¶ 58. The staff there was discussing facilities that a competitor proposed to sell to an incumbent, *see id.*, which the staff recognized § 251(c)(2) does not cover, *see id.* ¶ 71 n.200. When the staff addressed the entrance facilities it required the incumbent to provide to competitors, the staff grounded its analysis entirely in § 251(c)(3) and the FCC's since-rescinded unbundling rule, without describing those entrance facilities as "interconnection facilities" or relying on either § 251(c)(2) or the FCC's interconnection regulations. *See id.* ¶¶ 210-217.

interconnection." *Compare* Gov't C.A. Br. 20 (App. 138a) (FCC's concession that it "did not specifically define what it meant by the term 'interconnection facilities'").[35]

The references in the FCC's orders to "facilities" and "interconnection facilities" are instead naturally read to refer to the facilities (*e.g.*, cross-connect cables and ports) that the FCC had long required incumbents to provide as "accommodations" to facilitate interconnection at a point within the incumbent's network. *See supra* pp. 28-29; *see also* App. 19a-21a. Thus, the meaning of the FCC's qualifications in each order is plain, as the court of appeals recognized: the Commission intended to reassure competitors that incumbents were still obligated to assist competitors in attaching competitors' self-provided entrance facilities to a point within the incumbents' network. *See* App. 21a.[36]

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[35] The Michigan commission's suggestion (at 12 & n.7, 36) — which the government does not endorse — that "these facilities" in the second sentence of paragraph 140 should be read to mean "entrance facilities" is flawed. The phrase plainly refers back to "interconnection facilities," the immediately preceding referent. *See Webster's New International Dictionary* 2624 (2d ed. 1952) ("these" is the plural of "this"); *id.* at 2629 (when used as an adjective, "this" means "[t]hat is present, near, or *just referred to*, in time or place") (emphasis added); R.W. Burchfield, *Fowler's Modern English Usage* 780 (rev. 3d ed. 2000) (when used as an adjective, "this" "is used to indicate a thing or person present or near . . . . *esp. one just mentioned*") (internal quotation marks omitted; emphasis added).

[36] The suggestion in the Sixth Circuit's opinion (App. 19a-20a & n.9) that an incumbent could refuse to interconnect with a competitor's self-provisioned entrance facility — and instead require the competitor to interconnect with an incumbent-provided entrance facility — was incorrect. If a competitor builds an entrance facility and seeks to interconnect at a tech-

Third, the referenced "facilities" and "interconnection facilities" are limited to those that competitors "need" (*TRO* ¶ 366) or "require" (*TRRO* ¶ 140) to interconnect. The words "need" and "require" must have some meaning and cannot be read to mean whatever facilities competitors might "want" or "prefer."[37] Yet that is effectively how the government and petitioners read those words, which they never expressly address. The government thus takes the position that a competitor can demand continued TELRIC-priced access to *any* entrance facility it had obtained under the FCC's since-eliminated unbundling rules and was using to exchange traffic with the incumbent. *See* Gov't Br. 12-13, 23, 25, 29. Petitioners likewise give these words no meaning, with Talk America claiming (at 29) that AT&T's obligation to provide TELRIC-priced entrance facilities is "absolute."[38]

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nically feasible point within AT&T's network, AT&T is obligated to interconnect the competitor's entrance facility at that point. *See* 47 U.S.C. § 251(c)(2)(B). Even so, that suggestion was unnecessary to the Sixth Circuit's determination that the Michigan commission unlawfully required AT&T to provide entrance facilities at TELRIC rates.

[37] In *Verizon*, this Court similarly stressed that the combinations regulation that it sustained as analogous to § 251(c)(2), *see supra* pp. 21-22, applied only when the competitor is "unable" to make the combination itself. 535 U.S. at 534; *see id.* ("when requesting carriers cannot"), at 535 ("when the entrant is unable to do the job itself"), at 538 ("when the requesting carrier is unable to combine").

[38] The CPUC's claim (at 29 n.8) that a competitor "requires" an entrance facility whenever "it does not have one of its own" does not address the relevant question, which is whether the competitor requires the facility from the incumbent at TELRIC rates. *See TRRO* ¶ 140.

In fact, as the FCC found, competitors neither "need" nor "require" entrance facilities from incumbents at any price, because they can deploy their own entrance facilities or lease them from third parties. *See TRRO* ¶¶ 138-139, 141. Of course, there are facilities that competitors "need" or "require" in order to interconnect their own entrance facilities to a point within an incumbent's central office as an accommodation of interconnection: namely, the cross-connect cables, conduits, riser space, and ports that AT&T provides at TELRIC prices to competitors that supply their own entrance facilities. *See supra* pp. 28-29. For these reasons, the government is wrong to assert (at 20-21) that the FCC would have had no reason to refer to "interconnection facilities" in paragraph 140 of the *Triennial Review Remand Order* unless it meant "entrance facilities."

Fourth, yet another barrier to petitioners' and the government's reading of the *Triennial Review* orders is the Commission's finding that entrance facilities "are not inherently a part of the incumbent LEC's local network" and "exist *outside* the incumbent LEC's local network." *TRO* ¶ 366. The clear implication of this finding is (as the D.C. Circuit would recognize) that entrance facilities are more properly treated as part of the *competitor's* local network. *See USTA II*, 359 F.3d at 586 (finding it "anomalous that [competitors] do not themselves provide" their own entrance facilities). Thus, in the government's view, paragraph 366 obligates incumbents, to comply with their duty to provide interconnection at a "point within the [incumbent's] network," to furnish transport facilities that are not part of that network. That contradiction, which the government makes no

attempt to address, is further evidence that the government's reading of paragraph 366 is erroneous.

The government implicitly acknowledges as much when (at 23) it claims support for its position from the FCC's supposed conclusion in the *Triennial Review Remand Order* that entrance facilities are part of the incumbent's network. Yet the government never explains how its current position — that § 251(c)(2) requires entrance facilities — made sense at the time of the *Triennial Review Order*, when the FCC allegedly first embraced that position.[39]

Fifth, the efforts of petitioners and their *amici* to bolster their interpretations of the *Triennial Review* orders by distinguishing between competitors' uses of entrance facilities is unavailing. Even if the FCC's analysis of impairment under § 251(c)(3) in those orders were limited to entrance facilities when used for backhaul — and it plainly was not, *see TRRO* ¶¶ 138-139, 141; *supra* note 13 — that would not show that the Commission's statements in those orders are properly read as creating an affirmative obligation to provide entrance facilities under § 251(c)(2).

Finally, the government's reliance (at 18-19) on other rules supposedly permitting a competitor to use a facility for one purpose but not another — even if accurately described — would not show that the

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[39] In fact, the *Triennial Review Remand Order* did not find that entrance facilities are within the incumbent's "local network." That order did not mention, let alone reverse, the *Triennial Review Order*'s determination that entrance facilities exist outside the incumbents' local networks. *Cf. TRRO* ¶ 137 n.383 (observing that the *USTA II* court "expressed skepticism that incumbent LECs should be required to build entrance facilities under any circumstances").

FCC's statements in the *Triennial Review* orders are reasonably read to impose such a use-specific requirement for entrance facilities.[40] Similarly, Talk America's attempted analogy (at 14-18, 34-36) to pre-1996 Act FCC orders requiring the tariffing of facilities for purchase by interconnecting carriers is misplaced. Indeed, AT&T's position is that it should be permitted to charge its tariffed rates for entrance facilities. Moreover, the orders that Talk America cites were adopted under 47 U.S.C. § 201, which (unlike § 251(c)(2)) obligates carriers "to establish physical connections with other carriers, to establish through routes . . . , and *to establish and provide facilities* and regulations for operating such through routes." 47 U.S.C. § 201(a) (emphasis added).

For all those reasons, petitioners' and the government's efforts to read the *Triennial Review* orders as purporting to require entrance facilities under § 251(c)(2) are plainly incorrect. *Cf. Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000) (agency's regulatory interpretation must be rejected when it is "inconsistent with the text" of the regulation). Instead, the only reasonable interpretation of the FCC's statements in those orders is that "inter-

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[40] In fact, those other restrictions are based on the type of carrier using the facility; they do not restrict how a single carrier can use a facility to which it is permitted access. Thus, the FCC has prohibited wireless and long-distance carriers from obtaining UNEs for any purpose, while permitting competing local telephone companies to obtain UNEs and to use them for multiple purposes. *Compare* 47 C.F.R. § 51.309(b) *with id.* § 51.309(d). Similarly, the FCC barred traditional long-distance carriers from obtaining interconnection under § 251(c)(2), while allowing companies that provide competing local telephone service to obtain interconnection and to route long-distance traffic over those interconnection arrangements. *See id.* § 51.305(b); *Local Competition Order* ¶¶ 190-191.

connection facilities" and "entrance facilities" are different things, as the Sixth Circuit correctly concluded.

C. Requiring Incumbents To Provide TELRIC-Priced Entrance Facilities Under § 251(c)(2) Conflicts with the 1996 Act's Policy of Encouraging Facilities-Based Competition

1. In the 1996 Act, Congress sought "[t]o promote competition and reduce regulation" in the telecommunications marketplace. Pub. L. No. 104-104, 110 Stat. 56 (preamble). To that end, the 1996 Act embodies a clear preference for "genuine, facilities-based competition." *USTA II*, 359 F.3d at 576, 579. That means a telecommunications marketplace with multiple providers using their own equipment to serve customers, rather than "synthetic" competition, *Covad*, 450 F.3d at 548 (internal quotation marks omitted), in which competitors depend on the facilities of incumbents. *See Illinois Bell II*, 548 F.3d at 610 ("as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered"). Indeed, today, 15 years since Congress passed the Act, that is how competition has developed, with cable companies, wireless carriers, and Voice-over-Internet-Protocol providers, like Vonage, successfully competing for customers nationwide without leasing TELRIC-priced facilities from incumbents.

To promote that transition to facilities-based competition, the 1996 Act included some extraordinary measures intended to serve as temporary market-opening mechanisms. The unbundling requirement in § 251(c)(3) is one such measure, "perhaps [the] most intrusive." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398,

405 (2004), *see id.* at 410. The pricing standard in § 252(d)(1), which applies to both § 251(c)(3) and (c)(2), is another extraordinary measure. This Court has sustained the FCC's TELRIC pricing methodology implementing that standard, but only as applied to § 251(c)(3), and then only in recognition that paragraph (c)(3), properly interpreted, is limited to "bottleneck" facilities. *Verizon*, 535 U.S. at 510 & n.27, 515-17; *accord Local Competition Order* ¶ 702.[41]

As the D.C. Circuit and the FCC have explained on several occasions, there are well-recognized competitive harms that flow from mandating TELRIC pricing of non-bottleneck facilities. Far from being "an unqualified good," such mandates "inflict" significant costs "on the economy." *USTA I*, 290 F.3d at 429. Forcing incumbents to charge very low, regulated rates for access to their networks "reduce[s] or eliminate[s] the incentive for an [incumbent] to invest

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[41] The facilities and equipment within its central offices that AT&T provides to accommodate interconnection, *see supra* pp. 28-29, are effectively bottleneck items. Those items are located in restricted areas of AT&T's central offices that competitors are not permitted to enter. *See Local Competition Order* ¶ 598 (allowing incumbents "to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities" and noting that such "physical security arrangements . . . protect both the [incumbent's] and competitor's equipment from interference by unauthorized parties"). Moreover, to connect its entrance facility to an AT&T switch, a competitor needs access to particular equipment inside AT&T's central office. Thus, for example, a competitor cannot use just any port to access AT&T's switch; it needs to use a port attached to that particular switch. Because a competitor can neither access the areas within AT&T's central offices where interconnection occurs nor duplicate the particular interconnection facilities within those central offices, the facilities and equipment that AT&T provides to accommodate interconnection are effectively bottleneck items.

in innovation" because "it will have to share the rewards with [competitors]." *Id.* at 424. Likewise, TELRIC pricing of facilities subject to competitive supply creates a disincentive "for a [competitor] to innovate" or to invest in its own network facilities because "it can get the element[s] cheaper" from the incumbent. *Id.*; *accord TRRO* ¶ 36.[42]

Entrance facilities are not bottleneck elements: the FCC found in 2005 not only that entrance facilities have "unique operational and economic characteristics" that render "self-deployment" and "alternative wholesale supply" possible, but also that it was undisputed that competitors were in fact "increasingly relying on competitively provided entrance facilities," which "are widely available." *TRRO* ¶¶ 138, 139, 141. Neither petitioners nor any of their *amici* make any claim (let alone any showing) that entrance facilities are bottleneck elements.

Because entrance facilities are not bottleneck facilities, requiring incumbents to provide them at TELRIC rates contradicts the purpose of the 1996 Act, which was not "to guarantee competitors access

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[42] *See also Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."); *USTA II*, 359 F.3d at 572 (TELRIC pricing for non-bottleneck elements "discourage[s] investment in innovation"); *USTA I*, 290 F.3d at 429 (TELRIC pricing for non-bottleneck elements creates "disincentives to research and development by both [incumbents] and [competitors]"); *TRRO* ¶ 218 (TELRIC pricing for non-bottleneck elements can "seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition"); *TRO* ¶ 656 (TELRIC pricing for non-bottleneck elements is "no[t] necessary to protect the public interest").

to [incumbents'] network elements at the lowest price that government may lawfully mandate," but instead "to stimulate competition — preferably genuine, facilities-based competition." *USTA II*, 359 F.3d at 576; *see Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.").

Even more anticompetitive is the potential obligation of incumbents to build new entrance facilities for competitors at TELRIC rates. As the FCC recognized in the *Triennial Review Remand Order*, competitors "have a unique degree of control over the cost of entrance facilities . . . because they can choose the location of their own switches." *TRRO* ¶ 138. Requiring incumbents to provide competitors with newly built entrance facilities would dramatically reduce any incentive for competitors to act efficiently in choosing where to locate their switches in relation to their chosen point of interconnection.

The government's effort (at 25 n.7) to limit this case to "existing facilities" is unpersuasive. The interconnection-agreement language that the Michigan commission imposed, *see supra* p. 13, is not limited to those TELRIC-priced facilities already in place. The Michigan commission's order likewise reflects no such limitation. *See* App. 185a (competitors "have a right to entrance facilities"). And neither petitioner has disclaimed the view that AT&T must establish new TELRIC-priced circuits on existing facilities or construct new TELRIC-priced facilities (where facilities do not exist or existing facilities are at capacity). *See also* CPUC Br. 22 (asserting that § 251(c)(2) requires an incumbent to provide "existing

or new" entrance facilities). Finally, the government itself suggests (at 23) that "the governing standard" is "whether providing competitive LECs access to those entrance facilities for interconnection is technically feasible," not whether the entrance facility was obtained while the FCC still required unbundled access to such facilities under § 251(c)(3). The government's statement (at 25 n.7) that the FCC "has not ruled on whether" incumbents must "build new entrance facilities for a competitor's use" is thus cold comfort to incumbents such as AT&T. Even so, the government's refusal to defend petitioners' position insofar as it extends to construction of new facilities is effectively a concession that obligating incumbents to build entrance facilities (or even to establish new circuits on existing facilities) at TELRIC rates would contravene the policy of the 1996 Act.

2. Neither petitioners nor their *amici* present a coherent policy rationale for the result they seek. In particular, there is no attempt in the government's *amicus* brief or the FCC orders on which the government relies to square the requirement to provide TELRIC-priced entrance facilities under § 251(c)(2) with the 1996 Act's purpose. That omission further undermines any claim for deference to the government's *amicus* brief or the FCC orders. The few policy-based assertions that petitioners and their *amici* do make are without merit.

a. The Michigan commission incorrectly asserts (at 32) that the Sixth Circuit's decision places a "burden" on a competitor to "recreate an entire network." That claim ignores that this case involves only the transport facility connecting two networks. Nothing in the Sixth Circuit's decision affects competitors' ability to resell incumbents' services under

§ 251(c)(4) or to obtain access to elements of incumbents' networks under the FCC's existing rules implementing § 251(c)(3). That would include, for example, so-called "last mile facilities," such as the local loops made of copper wire connecting residential customer premises to switches, which the FCC has found to be bottleneck facilities. *See TRO* ¶¶ 199, 348.

b. Contrary to Sprint's and the CPUC's claims (and the government's passing assertion), the court of appeals' decision does not permit incumbents to increase prices for entrance facilities "unilaterally." Sprint Br. 2, 15; *see* CPUC Br. 15 (Sixth Circuit decision allows incumbents to "charge competition-dampening rates") (internal quotation marks omitted); Gov't Br. 15 (Sixth Circuit decision permits incumbents to charge "unregulated rate[s]"). As an initial matter, the prices that AT&T seeks to charge are set out in state and federal tariffs. *See Illinois Bell I*, 526 F.3d at 1072 (recognizing that "AT&T wants to be able to charge the tariff price" for entrance facilities); 47 U.S.C. § 201(b) (requiring charges for communication services to be "just and reasonable"). Because AT&T's tariffed rates for entrance facilities are subject to regulatory oversight, it is incorrect to say that, under the Sixth Circuit's decision, rates for access to entrance facilities would be "unregulated" or that incumbents could raise those rates "unilaterally."

More fundamentally, the upshot of the FCC's conclusion that competitors are not impaired in their ability to provide service without access to entrance facilities under § 251(c)(3) is that competitors can build entrance facilities themselves or obtain them from competitive providers. *See TRRO* ¶¶ 138-139,

141. As the FCC found, entrance facilities "are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices." *Id.* ¶ 141. Competitors simply do not "need" access to *incumbents'* entrance facilities — at any price. Accordingly, if competitors are dissatisfied with incumbents' tariffed rates for entrance facilities, they can lease those facilities from another provider or build their own entrance facilities.

c. Equally erroneous is Sprint's assertion (at 28) that, under the decision below, its costs to provide wireless service will increase. That claim is based on the false premise that, until now, Sprint's wireless operations have been leasing entrance facilities from incumbents at TELRIC rates. In fact, to the extent Sprint has been leasing entrance facilities from AT&T, it has been paying AT&T's tariffed rates.[43] Thus, Sprint is not seeking to prevent a price increase; rather, it is hoping for a windfall in the form of lower rates for facilities that it uses to transport traffic to and from AT&T's network. Moreover, Sprint's evident failure even to assert an entitlement to TELRIC-priced entrance facilities under § 251(c)(2) for years after the 1996 Act's enactment undermines the claim that such an obligation has long existed.

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[43] Wireless carriers, such as Sprint, have long been barred from obtaining unbundled network elements under § 251(c)(3). *See TRRO* ¶ 36 & n.108 (explaining that "wireless carriers do not currently use UNEs in their provision of mobile wireless services" and refusing to allow wireless carriers to lease UNEs because of their demonstrated ability to compete "without access to UNEs").

d. Finally, petitioners and the government are incorrect to the extent they suggest that requiring incumbents to provide TELRIC-priced entrance facilities under § 251(c)(2) is sensible as a policy matter because, when used for backhauling, entrance facilities carry traffic between customers of a competitor. *Cf. Pacific Bell*, 621 F.3d at 847 (asserting that, "[w]here a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits — both the originator and the recipient of the call are competitive LEC customers"); MPSC Br. 25, 27.

As an initial matter, "backhauling" is not limited to calls between customers of a competitor (or of a competitor and customers of a wireless carrier).[44] "Backhauling" describes a competitor's use of an entrance facility to connect its own switch to a loop (the wire connecting a customer premises to a switch) that the competitor obtained from an incumbent as an unbundled element under § 251(c)(3). The competitor then uses its switch to provide telephone service to the customer connected to the unbundled loop. *See, e.g., TRO* ¶ 480. Calls "backhauled" to the competitor's switch over that entrance facility might then be routed from the switch to other customers of the competitor (or to a wireless carrier), but also might be routed to customers of an incumbent, as Sprint recognizes (at 9). Thus, as a policy matter, the use of entrance facilities for backhauling cannot

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[44] For examples of misunderstandings of backhauling, see Talk Am. Br. 26 (asserting that backhauling occurs when a competitor uses entrance facilities "to carry traffic to and from its end users"); MPSC Br. 24-25 (illustrating backhauling as a call between two "competitive-carrier customers"); Gov't Br. 5-6 & n.4 (asserting that backhauling involves a call between two customers of a competitor or a call between a competitor's customer and a customer of a wireless carrier).

be distinguished from the use of entrance facilities to exchange traffic on the basis that only the competitor "benefits" (*Pacific Bell*, 621 F.3d at 847) from backhauling.

In all events, even if petitioners and their *amici* were correct that backhauling uniquely involves only a competitor's customers, that would not provide a policy justification for the result they seek. In particular, it would not explain why an incumbent should be required to provide competitors with entrance facilities at TELRIC rates, when the FCC has held that competitors can readily build those facilities themselves or buy them from a third party. *See TRRO* ¶¶ 138-139, 141.

* * *

Nothing in the text, structure, or purposes of the 1996 Act supports the claim of petitioners and their *amici* that the 1996 Act — a statute intended to promote facilities-based competition and to reduce regulation — obligates AT&T to provide entrance facilities to its competitors at artificially low prices, so that competitors can connect their own facilities and equipment to a point within AT&T's local network. The court of appeals was correct: if a competitor "chooses" to obtain an entrance facility from AT&T — rather than to "build its own entrance facility," "rent someone else's," or "connect" without using an entrance facility — the competitor "must pay the rates" in AT&T's tariffs. App. 32a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 47 U.S.C. § 201 provides:

47 U.S.C. § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that

such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

2. 47 U.S.C. § 251 provides:

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties

described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent

local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled

network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or enti-

ty) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation

schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

(A) is necessary –

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that –

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if –

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

3. 47 U.S.C. § 252 provides:

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that –

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does

not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this

section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including

requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

4. 47 C.F.R. § 51.5 provides in relevant part:

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * * * *

Interconnection. *Interconnection* is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

* * * * *

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

* * * * *

5. 47 C.F.R. § 51.305 provides:

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in§ 51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier; and

(4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

6. 47 C.F.R. § 51.315(d) (1997) provided:

§ 51.315 Combination of unbundled network elements.

* * * * *

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

* * * * *

7. 47 C.F.R. § 51.319(e) provides:

§ 51.319 Specific unbundling requirements.

* * * * *

(e) *Dedicated transport.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (*e.g.*, wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch "X"). Transmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) *Definition.* For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) *Availability.* (i) *Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport

that does not connect a pair of incumbent LEC wire centers.

(ii) *Dedicated DS1 transport.* Dedicated DS1 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS1 transport.* Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.

(B) *Cap on unbundled DS1 transport circuits.* A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS1 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS1 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier

paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, requesting carriers may not obtain new DS1 transport as unbundled network elements.

(iii) *Dedicated DS3 transport.* Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS3 transport.* Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Cap on unbundled DS3 transport circuits.* A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS3 transport circuits.* For a 12-month period beginning on the effective

date of the *Triennial Review Remand Order*, any DS3 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS3 transport pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, requesting carriers may not obtain new DS3 transport as unbundled network elements.

(iv) *Dark fiber transport.* Dedicated dark fiber transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(A) *General availability of dark fiber transport.* Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, though application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle dark fiber transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Transition period for dark fiber transport circuits.* For an 18-month period beginning on the

effective date of the *Triennial Review Remand Order*, any dark fiber dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled dark fiber transport pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, requesting carriers may not obtain new dark fiber transport as unbundled network elements.

(3) *Wire center tier structure.* For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least

24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

(4) *Routine network modifications.* (i) An incumbent LEC shall make all routine network modifications to unbundled dedicated transport facilities used by requesting telecommunications carriers where the requested dedicated transport facilities have already been constructed. An incumbent LEC shall perform all routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.

(ii) A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; and deploying a new multiplexer or reconfiguring an existing multiplexer. They also include activities needed to enable a requesting telecommunications carrier to light a dark fiber transport facility. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the installation of new aerial or buried cable for a requesting telecommunications carrier.

* * * * *

8. 47 C.F.R. § 51.321 provides:

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) Meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on any incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points. A requesting telecommunications carrier seeking a particular collocation arrangement, either physical or virtual, is entitled to a presumption that such arrangement is technically feasible if any LEC has deployed such collocation arrangement in any incumbent LEC premises.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incum-

bent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission, subject to any protective order as the state commission may deem necessary, detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations. These floor plans or diagrams must show what space, if any, the incumbent LEC or any of its affiliates has reserved for future use, and must describe in detail the specific future uses for which the space has been reserved and the length of time for each reservation. An incumbent LEC that contends space for physical collocation is not available in an incumbent LEC premises must also allow the requesting carrier to tour the entire premises in question, not only the area in which space was denied, without charge,

within ten days of the receipt of the incumbent's denial of space. An incumbent LEC must allow a requesting telecommunications carrier reasonable access to its selected collocation space during construction.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

(h) Upon request, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. This report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. This report must also include measures that the incumbent LEC is taking to make additional space available for collocation. The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.

(i) An incumbent LEC must, upon request, remove obsolete unused equipment from their premises to increase the amount of space available for collocation.

9. 47 C.F.R. § 51.701 provides:

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) *Telecommunications traffic.* For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paragraphs 34, 36, 39, 42-43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination.* For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch,

or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

10. 47 C.F.R. pt. 36, App. A, provides in relevant part:

APPENDIX TO PART 36 – GLOSSARY

* * * * *

Central Office

A switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building.

* * * * *

Trunks

Circuit between switchboards or other switching equipment, as distinguished from circuits which extend between central office switching equipment and information origination/termination equipment.

REPLY BRIEF

REPLY BRIEF

Supreme Court U.S.
FILED
MAR 2 3 2011
OFFICE OF THE CLERK

No. 10-329

In the Supreme Court of the United States

ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND GREG R. WHITE, COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION, PETITIONERS

v.

MICHIGAN BELL TELEPHONE COMPANY D/B/A AT&T MICHIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

According to the FCC, § 251(c)(2) of the Telecommunications Act means precisely what Petitioners have argued and competitive carriers have long understood: that incumbents have a broad duty to provide interconnection at TELRIC rates, and that duty encompasses entrance facilities. FCC Br. at 12–13 ("Under the [TRRO], an incumbent must make entrance facilities available to a competitor at cost-based rates when the competitor seeks to use those facilities to interconnect with the incumbent's network."). The FCC's position is dispositive of the question presented, because under this Court's precedent, the TRRO is a legislative rule entitled to *Chevron* deference, and the view the FCC sets forth in its amicus brief is entitled to *Auer* deference. Indeed, given the almost absurdly technical nature of the underlying issue, deference to the administrative agency's views should be at its peak.

Even absent deference, the FCC's and Petitioners' reading of § 251(c)(2) is supported by the statutory language and the FCC's regulations and legislative orders. AT&T's contrary arguments ignore dispositive language from all three of those sources. For example, and as discussed in more detail below:

- AT&T notes that entrance facilities are a type of dedicated transport, then cites 47 C.F.R. § 51.5 for the proposition that "interconnection" excludes "the transport and termination of traffic." But § 51.5 relates to an incumbent's entirely separate obligation to price the transport and termination of traffic *beginning* at the point

of interconnection and ending at the recipient's premises. 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701. Section 51.5 does not purport to restrict the definition of "interconnection" to non-transport functions, nor could it.

- The FCC does not require an incumbent carrier to provide "miles and miles" of interconnection facilities. For example LCO ¶ 553 delegates to state commissions the authority to decide "reasonable" and "appropriate" distances for a proposed meet-point interconnection where the FCC requires construction of new facilities. Br. App. 27a.

- An incumbent's duty to "provide interconnection" is not limited to providing equipment "inside incumbents' central offices." AT&T can only take that position by improperly paraphrasing the key LCO language on which AT&T relies. There is also no language in § 251(c)(2) even suggesting that the duty to "provide . . . interconnection" excludes a duty to lease existing interconnection facilities at TELRIC rates.

- And the fact that entrance facilities used for backhauling are not a market-entry impairment has nothing to do with § 251(c)(2) interconnection. For example, when wireless and cable companies seek to interconnect with AT&T customers, they

> have no need for backhauling. But if confronted with anti-competitive rate increases from AT&T, such companies will be forced to provide duplicate entrance facilities, precisely the result that Congress sought to avoid in enacting § 251(c)(2).

In the end, AT&T's arguments establish, at best, mere ambiguities in the statute and the orders. And that result leads right back to where the analysis began—that this Court should defer to the FCC's interpretation of the Telecommunications Act and the FCC's implementing regulations and orders. Petitioners respectfully request that the Court reverse the court of appeals.

REPLY ARGUMENT

1. Section 251(c)(2) of the Act and TRRO ¶ 140 require an incumbent carrier to provide a competitive carrier with entrance facilities, at TELRIC rates, to the extent required for interconnection.

The logic supporting the FCC's views is simple. Section 251(c)(2) requires an incumbent carrier to "provide . . . interconnection" to a competitive carrier "at any technically feasible point within the carrier's network" and at TELRIC rates. 47 U.S.C. § 251(c)(2); 47 U.S.C. § 252(d)(1). "Interconnection" is a "linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5; Br. App. 1a. An entrance facility physically links two carriers' networks. TRRO ¶ 136; Br. App. 8a (entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks"). Accordingly, when a

competitive carrier uses an entrance facility for the mutual exchange of traffic, the entrance facility serves an interconnection function, and § 251(c)(2) places on the incumbent the burden of providing the facility and charging for its use at TELRIC rates. Accord FCC Br. at 12–13 ("Under the [TRRO], an incumbent must make entrance facilities available to a competitor at cost-based rates when the competitor seeks to use those facilities to interconnect with the incumbent's network.").

The FCC confirmed this understanding in paragraph 140 of the TRRO, which states:

> We note in addition that our finding of non-impairment with respect to *entrance facilities* does not alter the right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to *these facilities* at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. [TRRO, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a (emphasis added).]

As the FCC explained in its amicus brief, its orders "use the term 'interconnection facility' to refer to an entrance facility that is being used for interconnection." FCC Br. at 16. Accordingly, the last sentence of ¶ 140 makes clear that "competitive LECs will have access to [entrance] facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." And 10 of the 12 circuit judges who have examined the

question agree. *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (7th Cir. 2008) (Easterbrook, J.) ("What the FCC said in ¶ 140 is that ILECs must allow use of entrance facilities for interconnection at 'cost-based rates.'"); *Southwestern Bell Tel. L.P.* v. *Missouri Public Serv. Comm'n*, 530 F.3d 676, 683–84 (8th Cir. 2008) ("If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC."); *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 846 (9th Cir. 2010) (the FCC has interpreted its orders "to allow competitive LECs to lease entrance facilities or 'transmission links' at TELRIC rates for the purpose of achieving interconnection"); Pet. App. 36a ("incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection") (Sutton, J., dissenting).

AT&T and its *amici* argue that deference to the FCC is unwarranted because the FCC's views conflict with the statute, regulations, and orders. But they can make that argument only by ignoring dispositive language in those very same sources.

A. "Interconnection" facilities can be used for transport under the FCC's rules.

AT&T's most superficially appealing argument is that an entrance facility is a type of dedicated transport, and the FCC has defined "interconnection" to *exclude* "the transport and termination of traffic." 47 C.F.R. § 51.5; Pet. App. 1a. Thus, AT&T argues, an entrance facility can never serve an interconnecting function. Resp. Br. at 26-28. AT&T's position represents a misunderstanding of the regulatory framework.

The FCC's use of the phrase "the transport and termination of traffic" in 47 C.F.R. § 51.5 relates to an incumbent's completely separate obligation, in 47 U.S.C. § 251(b)(5), to establish rate agreements "for the transport and termination of telecommunications." The FCC makes clear in 47 C.F.R. § 51.701 ("Scope of transport and termination pricing rules") that the phrase "transport and termination" refers to the incumbent's pricing for transporting traffic *from the point of interconnection*, across the incumbent's network, and to the end-office switch where the call is delivered to the recipient's premises. 47 C.F.R. § 51.701(c); Resp. App. 35a (defining transport as the transmission "from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party"); 47 C.F.R. § 51.701(d); Resp. App. 35a–36a (defining termination as the switching of traffic "at the terminating carrier's end office switch . . . and delivery of such traffic to the called party's premises").

In other words, the exclusionary language about transport in 47 C.F.R. § 51.5 is delineating two types of charges that an incumbent may assess a competitor for transmitting a call on the incumbent's network. See LCO ¶ 176 (explaining that § 251(c)(2) "refers only to the physical linking of two networks for mutual exchange of traffic" so that "[i]ncluding transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish 'reciprocal compensation arrangement for the transport and termination of telecommunications,' under section 251(b)(5).").

The first type is the interconnection charge that all parties agree must be set at TELRIC rates under § 251(c)(2). The second type is the transmission charge that the incumbent assesses for moving the call from the interconnection point to the intended recipient under § 251(b)(5).

The regulation does not purport to restrict the definition of "interconnection" to non-transport functions, nor could it. "If the duty to provide 'interconnection' did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC but refuse to carry calls to the incumbent LEC's terminal customers, thus effectively locking the competitive LEC out of the market." *Pacific Bell*, 597 F.3d at 968 n.16. See also *CompTel* v. *FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997) (explaining that the "LEC's duty is to provide interconnection for the facilities and equipment of the requesting carrier with the LEC's network," and the phrase "for the transmission and routing of telephone exchange service and exchange access" in § 251(c)(2) describes "what the interconnection, the physical link, would be used for."); *MCI MetroAccess Transmission Servs., Inc.* v. *Bellsouth Telecommcn's.*, 352 F.3d 872, 877 (4th Cir. 2003) (explaining that "the cost of interconnection" is "not the recurring cost of transport and termination of traffic."); see also FCC Br. at 3 n.1.

B. The FCC's interpretation of an incumbent's interconnection obligation does not require the incumbent to provide "miles and miles" of interconnection facilities.

AT&T and its amici repeatedly complain about having to pay for many "miles" of interconnection facilities. Res. Br. 21n.20. This is wrong for two reasons.

First, for the leasing obligation the incumbent's entrance facilities must already exist and the obligation is then to make them available at TELRIC rates. For leasing, there is *no* obligation to build new facilities to some remote location.

Second, even for the building of new facilties, the FCC has placed limits on an incumbent's interconnection obligations, specifically delegating to state commissions the authority to decide the "reasonable" and "appropriate" distance for a proposed meet-point interconnection, for example. LCO ¶ 553; Br. App. 28a ("Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.").

Moreover, incumbent carriers can recoup a competitive carrier's choice of interconnection points through rates under § 252(d)(1). E.g., LCO ¶ 199 (a CLEC "that wishes a 'technically feasible' but

expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit"); LCO ¶ 200 ("to the extent incumbent LECs incur costs to provide interconnection . . ., incumbent LECs may recover such costs from requesting carriers"); LCO ¶ 209 ("because [CLECs] must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect").

Most important, this case is about what AT&T can charge for leasing entrance facilities that are already in place. A wireless or cable company, like Sprint or Comcast, does not need entrance facilities for backhauling; customers are all connected by Sprint wireless towers or Comcast cable. But such companies *do* need to maintain the existing interconnection facilities AT&T provides. To accept AT&T's position will force companies like Sprint and Comcast to either charge their consumers for substantial AT&T rate increases, See Sprint Br. at 27, or to duplicate AT&T's entrance facilities with their own interconnection facilities, which is precisely what Congress sought to avoid when it enacted 47 U.S.C. § 251(c)(2).

C. An incumbent's duty to "provide interconnection" is not limited to providing only that equipment which is "inside incumbents' central offices," and includes a duty to lease existing interconnection facilities at TELRIC rates.

The Sixth Circuit below incorrectly believed that an incumbent's obligation to provide interconnection

was limited to making something available, such as a plug-in receptacle, and did not require the incumbent to do anything. But the FCC has already determined that § 251(c)(2) may require "some build out of facilities by the incumbent LEC." LCO ¶ 553; Pet. App. 27a. See also 47 C.F.R. § 51.5 ("A meet point interconnection arrangement is an arrangement by which each telecommunications carrier *builds* and maintains its network to a meet point.") (emphasis added).[1] This requirement is predicated on the incumbent carrier's obligation to make interconnection available at "any feasible point" within the "[incumbent][2] carrier's network." 47 U.S.C. § 251(c)(2)(B).

Critically, AT&T now concedes that the Sixth Circuit was wrong, i.e., that AT&T's § 251(c)(2) obligation is not a purely "passive" duty.[3] Resp. Br. at 29. But it tries to minimize that obligation by arguing that the interconnection obligation (1) does not extend beyond the incumbent's central-office walls, and (2) does not require an incumbent to lease existing interconnection facilities at TELRIC rates. Resp. Br. at

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[1] See also FCC Br. 24 ("Meet-point arrangements require an incumbent to build a transmission facility from its network to a designated meet point with a competitor 'for the mutual exchange of traffic.'").

[2] In Petitioners' Brief, the bracketed word "[incumbent]" was mistakenly replaced with the bracketed word "[competitor]." All parties agree that the proper word is "incumbent." The fact that § 251(c)(2) "may require, in some instances, that an incumbent carrier extend its own network to meet a competitive carrier's network," Pet. Br. 30–31, is found in the meet-point regulation, 47 C.F.R. § 51.321.

[3] This is one of many jarring examples where AT&T disavows the Sixth Circuit's reasoning and AT&T's own lower-court arguments.

20–25, 28–31. Again, AT&T's position is fundamentally at odds with the regulatory scheme.

In support of its first argument, AT&T relies on ¶ 553 of the Local Competition Order, which AT&T cites for the proposition that even in a meet point arrangement, the point of interconnection remains on a point within the incumbent carrier's network, inside the incumbent's central office. Resp. Br. at 30–31. But in making that point, AT&T selectively quotes from LCO ¶ 553 and then only paraphrases when asserting that the point of interconnection "would remain inside the incumbent's central office." *Id.* at 31. All ¶ 553 actually says is that in a meet-point arrangement, the point of interconnection "remains on 'the local exchange carrier's network.'" LCO ¶ 553; Pet. App. 27a. And an incumbent's entrance facility is necessarily on the incumbent carrier's network, or there would have been no need for the FCC, in the TRRO, to conduct a § 251(c)(3) unbundling analysis for entrance facilities. That was the point of the D.C. Circuit's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), which rejected the FCC's conclusion, in the TRO, that entrance facilities were not part of the incumbent's network.

Moreover, there is no support for AT&T's position that the point of interconnection is typically in the incumbent's central office. E.g., Resp. Br. at 31. To the contrary, the FCC's regulations establish that a competitive carrier may choose to physically interconnect with an incumbent at a single point—of the competitor's choosing—within a Local Access Transport Area. *Application by SBC Communications Inc., et al. Pursuant to Section 271 of the*

Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Texas, 15 FCC Rcd. 18354, 18390 ¶ 78, n.174.

In support of the second argument, AT&T does not cite anything; it simply makes the naked assertion that nothing in the text of § 251(c)(2) suggests that the incumbent carrier has a duty to lease a facility at TELRIC rates. Resp. Br. at 20. But there is no limiting language in § 251(c)(2) that alleviates AT&T's duty to lease interconnection facilities at TELRIC rates. The broad duty is "to provide . . . interconnection" for the facilities and equipment of any requesting carrier. 47 U.S.C. § 251(c)(2). Having already acknowledged that the duty to provide may include the duty to build, there is no statutory basis for limiting the obligation in the manner AT&T suggests.[4]

D. AT&T's additional attacks on the FCC's conclusion lack merit.

The balance of AT&T's criticisms of the FCC's views can be rebutted in summary fashion.

For example, AT&T asserts that the FCC has conceded its regulations "do not expressly require incumbents to provide entrance facilities to satisfy the interconnection obligations under Section 251(c)(2)." Resp. Br. at 5–6, citing FCC Br. at 22 n.6. AT&T does not disclose that the FCC was talking about the rules it

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[4] AT&T's only explanation for this anomaly is to suggest that the obligation to build new facilities may be "[un]lawful"—even though this requirement has been in place since 1996. Res. Br. 31 n.25 ("The lawfulness of the FCC's meet-point rule was not tested in the court of appeals.").

issued in 1996, when entrance facilities were still considered a network element that had to be unbundled under § 251(c)(3). FCC Br. at 22 n.6. As the FCC explained, "[o]nly after the FCC eliminated access to entrance facilities as unbundled network elements did it have occasion to clarify, in the [TRO] and the [TRRO], that §251(c)(2) gives competitive LECs a right of access to such [entrance] facilities for interconnection at cost based rates." *Ibid.*

Likewise, AT&T relies on ¶ 140 of the TRRO to argue that a competitive carrier is only entitled to interconnection it "requires," not interconnection it "wants" or "prefers." Resp. Br. at 44. But ¶ 140 does not limit a competitive carrier's access to entrance facilities at regulated rates to the extent the carrier requires such facilities "*for* interconnection." The paragraph says a competitive carrier will have access to entrance facilities at regulated rates to the extent that they require them "*to* interconnect" (as opposed to backhauling). Pet. App. 15a. Read in tandem with § 251(c)(2)(B), a competitive carrier has the authority to say where, within the incumbent carrier's network, interconnection is desired. If the competitive carrier requires facilities "to interconnect" at that point, the incumbent carrier must lease its facilities at TELRIC rates.

AT&T also attacks the "numerous flaws" in the very simplified diagram that Petitioners provided on page 23 of their Petitioners' Brief to show examples of interconnection and backhauling. In reality, AT&T identifies only two purported problems, Resp. Br. at 29 n.23, and neither is relevant to the issue presented. For example, it does not matter whether parties have

constructed a single wire or two wires for fulfilling an entrance facility's two purposes; what is important is that the FCC has distinguished between those two uses for purposes of determining how an incumbent can charge a competitive carrier.[5] Similarly, the interconnection distance has nothing to do with when an incumbent has a § 251(c)(2) duty to provide interconnection.

Finally, AT&T incorrectly suggests that the limitation in 47 U.S.C. § 201(b)—that uncapped rates must be "just and reasonable"—makes uncapping a non-event. As Sprint explains in its *amicus* brief, its nine-State survey demonstrated a difference between TELRIC and non-TELRIC rates that ranged from 63-75%. This is hardly the *de minimis* change AT&T makes it out to be.

Ultimately, however, AT&T's criticisms of the FCC are of only academic interest. That is because those criticisms show, at most, that there are statutory and regulatory ambiguities requiring resolution. And as this Court made clear in *Chevron* and *Auer*, it is exclusively within the FCC's regulatory power to resolve such ambiguities, and the FCC has done so here.

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[5] AT&T's amici, the United States Telecom Association and Network Engineers, assert that incumbents have no way to know when a competitive carrier is using an entrance facility for backhaul purposes. Telecom Assoc. Br. at 29. The Seventh and Ninth Circuits have correctly rejected that proposition. *Pacific Bell Tel.*, 621 F.3d at 842 n.8 ("Incumbent LECs are capable of screening out calls that would be used for backhauling."); *Illinois Bell Tel.*, 526 F.3d at 1071–72 (accepting the Illinois state commission's statement that "ILECs can detect and block any attempted use of an entrance facility for backhauling.").

II. The Court should begin and end its analysis by deferring to the FCC's conclusion that incumbent carriers must make entrance facilities available to competitors, at TELRIC rates, to the extent those facilities are used for interconnection.

When imposing the interconnection duty on incumbent carriers under § 251(c)(2), Congress did not explicitly address whether an incumbent is obligated to provide entrance facilities to a competitive carrier for the purpose of interconnecting the carriers' networks. In its orders, the FCC has provided a reasonable interpretation of § 251(c)(2) and § 251(c)(3) of the Act, and the FCC's orders are entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). *Nat'l Cable Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Under its § 251(d) statutory authority, the FCC lawfully promulgated regulations establishing unbundling requirements, which included what network elements should be unbundled. In the TRRO, the FCC determined that a competitive carrier is not impaired without access to entrance facilities, and therefore is not entitled to such facilities as an unbundled network element. In addition, the FCC specifically affirmed the TRO's statement that an incumbent carrier still has an obligation under § 251(c)(2) to provide entrance facilities available at TELRIC rates for the purpose of network interconnection. TRRO ¶¶ 136–41; Pet. App. 8a–16a; accord TRO ¶ 366; Pet. App. 20a.

This Court affords deference to an agency's fair and considered judgment unless it is plainly erroneous or inconsistent with the regulation. *Coeur Alaska, Inc.* v. *Se. Alaska Cons. Council*, 129 S. Ct. 2458, 2470 (2009); *Auer* v. *Robbins*, 519 U.S. 452, 461–62 (1997); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945). Specific to this case, deference is warranted to the FCC's fair and considered opinion, set forth in its orders and the *amicus* brief submitted to the Court, acknowledging the dual use of entrance facilities and the incumbent's separate obligations under the Act.

A. The FCC's reasonable orders warrant *Chevron* deference.

Deference is given to an expert federal agency's reasonable interpretation of the statutes it administers. *Chevron*, 467 U.S. at 842–45. This includes deference to FCC rulemaking orders, like the TRO and TRRO, because these orders are legislative acts that interpret the Telecommunications Act. *Central Tex. Tel. Coop., Inc.* v. *FCC*, 402 F.3d 205, 211 (D.C. Cir. 2005).

In an attempt to justify why this Court should not defer to the TRRO, AT&T attempts to cavalierly dismiss portions of that order as constituting only "a few sentences." Resp. Br. at 32. But even AT&T acknowledges that the process of rulemaking (which would necessarily include FCC orders rationalizing and promulgating regulations) is the "paradigmatic example" of agency action subject to *Chevron* deference. Resp. Br. at 33, citing *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). In other words, an agency's interpretation qualifies for deference when

Congress grants an agency the general authority to make rules, and, as here, the agency's interpretation was promulgated while exercising that authority. *Id.* at 226–27.

In the TRO and TRRO, the FCC implemented the Act's provisions—precisely as Congress authorized—and adopted seven pages of amendments to the Code of Federal Regulations, all pursuant to a formal notice-and-comment period. TRRO, 20 FCC Rcd. at 2543–45 (¶¶ 17–19). See also TRRO, 20 FCC Rcd. at 2666–69 (¶¶ 235–51); Pet. Br. at 40. The FCC's orders, undertaken concurrently with the issuance of new regulations, are legislative acts that should be given deference. *Central Tex.*, 402 F.3d at 211.

While a notice-and-comment period provides an indicator for *Chevron* deference, the Court has not narrowly construed the application of deference to such a proceeding. E.g., *Barnhart* v. *Walton*, 535 U.S. 212, 221–22 (2002). The TRRO underwent a formal administrative process, and the FCC's reasoned interpretation of the Act, contained in its legislative orders, should be afforded *Chevron* deference.

AT&T's only other *Chevron* argument is that the FCC did not provide notice that it was using the TRRO to say something new about the interconnection obligation. E.g., Resp. Br. at 34–35. That is because the FCC did not say anything new; the FCC has never once suggested that an incumbent carrier's broad duty to provide interconnection does not include entrance facilities.

B. The FCC's amicus position warrants *Auer* deference.

Deference is also afforded to an expert agency's construction of a regulation it administers unless Congress has "directly spoken to the precise question at issue." *Auer*, 519 U.S. at 457. As discussed in this case, the FCC interpreted its regulations twice: 1) in its orders; and 2) in its *amicus* briefs to this Court and the Sixth Circuit. The Court should afford deference to the FCC's consistent interpretation.

AT&T argues that the application of *Auer* deference is improper when the agency's interpretation is "inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment on the matter in question." Resp. Br. 36–40 (citing *Auer*, 519 U.S. at 461–62.) While recognizing the limitations this Court has placed on *Auer's* applicability, the three points AT&T raises are unavailing.

First, in an attempt to distinguish this case from the Court's most recent decision applying *Auer* deference, *Chase Bank USA, N.G.* v. *McAvoy*, 131 S. Ct. 871, 880-881 (2011), AT&T alleges that the FCC did not interpret a regulation here. Resp. Br. at 36. But there is no sound reason to defer to an agency interpretation of a regulation but not to an interpretation of a legislative order that has undergone notice and comment. Either way, the agency is interpreting a purported ambiguity in one of its own formal orders. Who is in a better position to render such an interpretation?

Second, AT&T contends that deference is unwarranted because, as the Court said in *Christensen*,

the FCC attempted "to create *de facto* a new regulation." Resp. Br. at 38, citing *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000). AT&T seeks to make this point by asserting that the FCC's interpretation of the TRRO was an attempt to *create* a new interconnection obligation.[6] Resp. Br. at 37–38. This statement is inaccurate, confusing the separate obligations AT&T has to unbundle network elements and to provide for interconnection. Thus, while 47 C.F.R. § 51.319(e)(2)(i) eliminates unbundled access of entrance facilities under § 251(c)(3), the FCC made clear in the *TRO* (well before the TRRO): "to the extent that requesting carriers need facilities in order to interconnect with the incumbent LEC's network, section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." TRO ¶ 366; Pet. App. 20a.

Third, AT&T attempts to argue that the FCC's judgment is not "fair and considered" because the FCC supplemented arguments in its *amicus* brief to this Court. Resp. Br. at 40–41. While it is true that the FCC's brief in this Court elaborated on the FCC's

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[6] AT&T is wrong to suggest that the FCC, prior to filing its *amicus* brief, required only two methods of interconnection. Resp. Br. at 37. 47 C.F.R. § 51.321(b) says the contrary. "Technically feasible methods of obtaining interconnection or access to unbundled network elements include, *but are not limited to*: (1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and (2) Meet point interconnection arrangements." 47 C.F.R. § 51.321(b); Resp. App. 32a (emphasis added); see also LCO ¶ 180 (explaining "that inflexible or overly detailed national rules implement section 251(c)(2) may inhibit the ability of the states or the parties to reach agreement that reflect technological or market advances and regional differences").

previous position, as did the briefs of the Petitioners and Respondent, the positions the FCC articulated in the Sixth Circuit and in this Court are identical.[7] Compare FCC 6th Cir. Br. at 14–22 with FCC Br. at 12–33. More precisely, in both briefs, the FCC maintains that the FCC's orders treat entrance facilities differently depending on their use; that incumbents have separate interconnection and unbundling obligations under §§ 251(c)(2) and 251(c)(3), respectively; and that the courts should defer to the FCC's reasonable interpretation of the statutes it administers and the orders it has adopted. FCC Br. at 15; FCC 6th Cir. Br. at 14–22.

This Court's decisions addressing when deference should be afforded to agency pronouncements cover a broad spectrum, ranging from regulations adopted by the agency (*Chevron*) to letter rulings issued by field agents (*Mead*). The legislative orders and *amicus* briefs the FCC has filed in this case fall far closer to the

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[7] AT&T argues that FCC deference is undermined by the fact that there is no indication that the full Commission approved the FCC's *amicus* brief. Resp. Br. at 40–41, n.33. AT&T's argument is in direct conflict with this Court's decisions. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9. (1980) ("To be sure, the administrative interpretations proffered in this case were issued by the Federal Reserve staff rather than the Board. But to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction."); *Auer*, 519 U.S. at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."). And the argument wrongly assumes that every administrative agency must formally approve every legal document filed in every court. Thankfully, this Court has not imposed such an onerous requirement on agencies.

Chevron/Auer end of the spectrum and should be afforded deference.

III. The Congressional goal of competition is advanced by the FCC's interpretation of § 251(c)(2), and hurt by AT&T's interpretation.

As Congress and the FCC have both recognized, cost-based interconnection is critical to creating the market competition that the Telecommunications Act was intended to provide. "[A]bsent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network." LCO ¶ 10. And without the ability to connect to AT&T's millions of customers, a competitor's likelihood of survival is zero.

AT&T devotes a substantial portion of its brief arguing that the FCC's determination—that an incumbent's duty to provide interconnection encompasses entrance facilities—is a policy at odds with the FCC's determination that an incumbent need not unbundle its entrance facilities under § 251(c)(3). Resp. Br. at 48–56. AT&T's position is both misplaced and unfounded.

First, and most important, AT&T is advancing its policy argument in the wrong forum. It is not the FCC that chose to impose § 251(c)(2)'s extremely broad interconnection requirement, but Congress. If AT&T believed that its interconnection duty should be tied to a market-impairment analysis, like § 251(c)(3), then it should have lobbied for that result. The courts are not a second-shot forum for litigants to collaterally attack

Congressional policy, yet that is precisely how AT&T is treating this litigation.

Second, interconnection is more essential than unbundling. Many competitive carriers already have complete networks (e.g., Sprint wireless, or Comcast cable), and even though they do not require unbundling, they still need to interconnect their own complete networks with the incumbent for the networks to talk to one another (and for Sprint or Comcast to make inroads in the once-monopoly local market). This is consistent with the FCC's focus on promoting facilities-based competition, which it has found to be the underlying purpose of the 1996 Act.

For example, in *Brighthouse Networks LLC et al., v. Verizon California, Inc.*, 23 FCC Rcd. 10704, ¶27 (2008), *aff'd Verizon California, Inc. v. FCC*, 555 F.3d 270 (2009), the FCC explained that it has "repeatedly described" the "promot[ion] of facilities-based competition" "as a fundamental policy of the act." Footnote 68 then lists several FCC decisions so finding, including the TRO and the TRRO, the latter of which at paragraph 3 explained that unbundled network elements are only a transitional device to aid the development of facilities-based competition.

The fact that § 251(c)(3) imposes a higher bar for unbundled network elements than § 251(c)(2) thus makes sense as a matter of policy: not every carrier needs UNEs, but every carrier needs (and will continue to need) interconnection. *See Time Warner Wholesale Services Order*, 22 FCC Rcd. 3513, 3519 (2007) ("ensuring the protections of section 251 interconnection is a critical component of the growth of facilities-based local competition.") Indeed, rather

than inhibiting facilities based competition, as AT&T contends (Resp. Br. at 48–52), the FCC has concluded that broad interconnection rights under § 251(c)(2) actually promote facilities-based competition. AT&T's reading of § 251(c)(2), on the other hand, will leave in place the "insurmountable competitive advantage" of incumbent carriers like AT&T. See *Verizon* v. *FCC*, 535 U.S. 467, 490-91 (2002).

This point is illustrated vividly by a company like Sprint, which seeks to compete in the local telephone market by using its wireless network. To reiterate the point, Sprint has no need to backhaul; it connects its own customers wirelessly. But its business depends on the many thousands of *existing* interconnections it has with AT&T's network so that Sprint's customers can connect to AT&T's customers. If AT&T is successful in importing a § 251(c)(3) impairment analysis into § 251(c)(2)'s interconnection requirements, Sprint will be forced to make a choice: experience a 63-75% increase in charges for those interconnections, Sprint Br. at 27, or construct duplicate entrance facilities across the country to break AT&T's monopoly. That is precisely the conundrum that Congress sought to prevent when it imposed on incumbents the very broad interconnection duty in § 251(c)(2). In sum, the policy vindicated by a ruling in favor of Petitioners is precisely the one Congress and the FCC have sought to advance through their legislation and interpretation, respectively.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2011

AMICUS CURIAE BRIEF

Nos. 10-313 and 10-329

In the Supreme Court of the United States

TALK AMERICA, INCORPORATED, PETITIONER

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN

OKJIAKOR ISIOGU, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Under 47 U.S.C. 251(c)(2), an incumbent local exchange carrier must "provide * * * interconnection" at cost-based rates to a requesting competitive local exchange carrier "at any technically feasible point within the [incumbent] carrier's network." An "entrance facility" is a transmission facility owned by an incumbent carrier that connects its network to that of a competitive carrier. The question presented is as follows:

Whether an incumbent must make an entrance facility available at cost-based rates when a competitive carrier seeks to use such a facility for interconnection.

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In the Supreme Court of the United States

No. 10-313

TALK AMERICA, INCORPORATED, PETITIONER

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN

No. 10-329

ORJIAKOR ISIOGU, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

These cases present the question whether an incumbent local exchange carrier must provide "entrance facilities" to a competitive local exchange carrier at cost-based rates under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, as amended by the Telecommunica-

tions Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. The Federal Communications Commission (FCC or Commission) has rulemaking authority under the Communications Act, see 47 U.S.C. 201(b), and it has adopted several orders addressing the regulatory treatment of entrance facilities. The United States therefore has a significant interest in the resolution of the question presented. In the court of appeals, the FCC filed a brief as an amicus curiae at the invitation of the court.

STATEMENT

1. The 1996 Act "fundamentally restructure[d] local telephone markets" in order to "end[] the longstanding regime of state-sanctioned monopolies" and open those markets to competition. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress recognized that prospective competitors faced significant barriers to entering markets that were dominated by the pre-existing monopolists—incumbent local exchange carriers (incumbent LECs or ILECs). To aid new entrants in overcoming those barriers, Congress enacted 47 U.S.C. 251(c). That provision enables competitive carriers to enter local markets by using the incumbents' networks in distinct but overlapping ways, two of which are relevant here.

First, Section 251(c)(2) requires incumbent LECs to "provide * * * interconnection" between their networks and the networks of competitive LECs (CLECs). 47 U.S.C. 251(c)(2). Interconnection is "the physical linking of two networks for the mutual exchange of traffic." *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,590 ¶ 176 (1996) (subsequent history omitted) (*Local Competition Order*); see 47 C.F.R. 51.5. Such linking

enables customers of a competitive LEC to call the incumbent's customers, and vice versa. The absence of such interconnection would disadvantage the competitive LEC, whose customers would be unable to call (or receive calls from) the incumbent's much larger customer base.[1]

Section 251(c)(2) requires an incumbent LEC to provide interconnection to a requesting competitive carrier "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. 251(c)(2)(B); see 47 C.F.R. 51.305. Recognizing the important role that interconnection plays in fostering local telephone competition, the FCC has directed that incumbents must provide competitors "any technically feasible method of obtaining interconnection * * * at a particular point upon a request." 47 C.F.R. 51.321(a); see *Local Competition Order*, 11 F.C.C.R. at 15,780-15,781 ¶ 553. Those methods "include, but are not limited to," "[p]hysical collocation," under which a competitive LEC installs its switching equipment in an incumbent's central office; "virtual collocation," under which an incumbent installs and maintains equipment in its central office for a competitor; and "[m]eet point interconnection arrangements," under which an incumbent and a competitor both build out their facilities to meet the other's. 47 C.F.R.

[1] Interconnection "does not include the transport and termination of traffic." 47 C.F.R. 51.5. Instead, compensation for transport and termination—that is, for delivering local telephone calls that are placed by the customer of another carrier—is governed by separate provisions in the 1996 Act. 47 U.S.C. 251(b)(5), 252(d)(2). Typically, a competitive LEC will pay an incumbent a cost-based rate for interconnection under Section 251(c)(2) and, in addition, will separately pay a cost-based rate to terminate local telecommunications traffic that travels from the competitor to the incumbent over the facilities the competitor has leased for interconnection.

51.321(b); see 47 C.F.R. 51.5; *Local Competition Order*, 11 F.C.C.R. at 15,779-15,781 ¶¶ 549-553.

Second, Section 251(c)(3) separately requires incumbent LECs to lease certain "network elements" to competitors "on an unbundled basis." 47 U.S.C. 251(c)(3); see *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 531 (2002) ("To provide a network element 'on an unbundled basis' is to lease the element, however described, to a requesting carrier at a stated price specific to that element."). That requirement gives competitors the right to lease parts of an incumbent's network, enabling them to "compete with the incumbent carrier to provide local service" without having to incur the expense of "replicating the incumbent's entire existing network." *Id.* at 490. Before a competitive LEC is entitled to lease an unbundled network element, however, the FCC must determine that lack of access to that element would "impair" the competitor's "ability * * * to provide the services that it seeks to offer" to its customers. 47 U.S.C. 251(d)(2)(B); see *AT&T Corp.*, 525 U.S. at 387-392.

The 1996 Act provides that rates for both interconnection and unbundled network elements must be cost-based and may include a reasonable profit. 47 U.S.C. 252(d)(1).[2] It also establishes procedures that incumbents and their competitors must follow when implementing Section 251(c)'s interconnection and unbundling obligations. Carriers may voluntarily negotiate contracts ("interconnection agreements"), but if negotiations fail, disputed issues are referred to state commis-

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[2] The Commission's rules prescribe a methodology for calculating those rates that is known as "total element long-run incremental cost" (TELRIC). See 47 C.F.R. 51.505(b). This Court has upheld that methodology as lawful and consistent with the statute. *Verizon Commc'ns Inc.*, 535 U.S. at 501-523.

sions for mandatory arbitration. 47 U.S.C. 252(a)-(c). The decisions of state commissions are subject to review in federal district court. 47 U.S.C. 252(e)(6); see *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 641-644 (2002).

2. This case concerns the proper regulatory treatment of "entrance facilities"—transmission facilities (typically wires or cables) that are owned by incumbent LECs and "that connect competitive LEC networks with incumbent LEC networks." *Unbundled Access to Network Elements*, 20 F.C.C.R. 2533, 2609-2610 ¶¶ 136-137 (2005) (*Triennial Review Remand Order* or *TRRO*) (reprinted at Pet. App. 155a-158a),[3] aff'd, *Covad Commen's Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006). Entrance facilities have two distinct principal uses. First, a competitor can use an entrance facility to interconnect its equipment with the incumbent's equipment, so that calls can move back and forth between customers on the two networks. For example, when a competitor's customer calls the incumbent's customer, the call might travel through the competitor's switch and then over the entrance facility to the incumbent's switch, so that the incumbent can route the call to the appropriate destination on its network.

Second, a competitor can use an entrance facility to transport traffic between points on its own network. For example, a competitor might use an entrance facility to carry a call from one of its customers to its own switching equipment collocated at the incumbent's office, so that the call can then be routed to another customer of the competitor. Using an incumbent's entrance

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[3] All references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 10-329.

facility in that manner is known as "backhauling." See *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 842 (9th Cir. 2010) (diagram illustrating the use of an entrance facility for interconnection and backhauling), petition for cert. pending, No. 10-838 (filed Dec. 23, 2010).[4]

In 2003, the FCC adopted the *Triennial Review Order* (*TRO*), in which it determined that entrance facilities are "facilities that exist *outside* the incumbent LEC's local network" and therefore are not network elements that can be subject to mandatory unbundling under Section 251(c)(3). *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,203 ¶ 366, vacated in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), cert. denied, 543 U.S. 925 (2004) (*USTA*). The Commission recognized that "[c]ompetitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic," and it explained that "[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnec-

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[4] As respondent points out (Br. in Opp. 25 n.28), some courts have used imprecise language to describe backhauling. Backhauling is not limited to calls that originate and terminate with a competitive LEC's customers. Instead, it occurs whenever a competitive LEC uses an entrance facility for a purpose other than interconnection with an incumbent. For example, backhauling occurs when a competitive LEC leases an incumbent's entrance facility to transport a call originated by one of its customers to a customer served by a wireless provider with which the competitive LEC has interconnected. For purposes of this case, however, the precise definition of backhauling is not relevant. Rather, the crucial point is that the Commission's orders have treated entrance facilities differently based on whether the facilities are being used for interconnection or for backhauling.

tion, the Act does not require incumbent LEC's to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *Id.* at 17,203 ¶ 365 (footnote omitted). At the same time, the Commission emphasized that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *Id.* at 17,204 ¶ 366 (quoting 47 U.S.C. 251(c)(2)) (brackets in original).

The D.C. Circuit granted petitions for review of the FCC's order and rejected the Commission's finding that entrance facilities are not "network elements" for purposes of Section 251(c)(3). *USTA*, 359 F.3d at 585. Noting that the statute defines the term "network element" as "'a facility [or] equipment used in the provision of a telecommunications service,'" the court concluded that "the Commission's reasoning appears to have little or no footing in the statutory definition," and it remanded for further consideration. *Id.* at 585-586 (quoting 47 U.S.C. 153(29)). The court did not address the FCC's conclusion that Sections 251(c)(2) and 251(c)(3) impose distinct statutory obligations on an incumbent's provision of entrance facilities.

On remand, the FCC adopted the *Triennial Review Remand Order*, in which it found, contrary to its earlier conclusion, that entrance facilities are within the incumbent's network and therefore are correctly classified as "network elements." *TRRO*, 20 F.C.C.R. at 2609-2610 ¶¶ 136-137.[5] Based on the "economic characteristics of

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[5] Specifically, the *Triennial Review Remand Order* "reinstate[d] the *Local Competition Order* definition of dedicated transport to the extent

entrance facilities," however, the agency determined that competitive carriers are not impaired in their ability to provide service without unbundled access to entrance facilities. *Id.* at 2610 ¶ 138. Accordingly, the Commission adopted a regulation specifying that Section 251(c)(3) does not obligate incumbents to provide competitors with access to entrance facilities on an unbundled basis. 47 C.F.R. 51.319(e)(2)(i) ("*Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers."). As it had in the *Triennial Review Order*, however, the FCC emphasized that its "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." *TRRO*, 20 F.C.C.R. at 2611 ¶ 140. "[C]ompetitive LECs," the agency explained, "will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *Ibid.*

3. Respondent is an incumbent LEC in Michigan. Shortly after the FCC issued the *Triennial Review Remand Order*, respondent notified competitive LECs that it would no longer provide entrance facilities at a cost

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that it included entrance facilities." 20 F.C.C.R. at 2610 ¶ 137. The FCC explained that, in the *Local Competition Order*, it had defined dedicated transport as "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers." *Id.* at 2609 ¶ 136 (citing *Local Competition Order*, 11 F.C.C.R. at 15,718 ¶ 440). Thus, according to the *Triennial Review Remand Order*, an entrance facility is dedicated transport, defined as an "incumbent LEC transmission facilit[y]," or a facility that by definition is part of the incumbent's network.

based rate, but instead would require competitive LECs to pay a higher rate if they wished to continue using such facilities. Pet. App. 8a. Various competitive LECs complained to the Michigan Public Service Commission that respondent's action unlawfully abrogated their right to cost-based interconnection under Section 251(c)(2). *Id.* at 98a-100a. The Michigan commission arbitrated the dispute in favor of the competitive LECs. *Id.* at 100a. Relying on the *Triennial Review Remand Order*, it concluded that competitive LECs "still have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." *Ibid.*

4. Respondent challenged the Michigan commission's ruling in federal district court, and the district court vacated the ruling. Pet. App. 54a-82a. The court construed the *Triennial Review Remand Order* to reflect a conclusion by the FCC that "entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis." *Id.* at 70a. The court acknowledged the FCC's statement that its determination with respect to unbundling did not alter incumbents' distinct interconnection obligation. *Ibid.* The court held, however, that "[i]t is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule"—*i.e.*, 47 C.F.R. 51.319(e)(2)(i). Pet. App. 70a.

5. The Michigan commission and several competitive LECs appealed. At the invitation of the court of appeals, the FCC filed an amicus brief urging the court to reverse the district court's decision. The Commission emphasized its statements in Paragraph 140 of the *Triennial Review Remand Order* "that its rule relieving incumbent LECs of the duty to unbundle entrance facili-

ties and its non-impairment finding 'do[] not alter the right of competitive LEC's to obtain interconnection facilities pursuant to section 251(c)(2),'" and "that 'competitive LEC's will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.'" FCC C.A. Br. 10-11 (quoting *TRRO*, 20 F.C.C.R. at 2611 ¶ 140) (brackets in original). The FCC argued that the Michigan commission "was correct in accepting the agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LEC's' section 251(c)(2) obligations." *Id.* at 11.

6. The court of appeals affirmed. Pet. App. 1a-51a.

a. The court of appeals construed Section 251(c)(2)'s directive that an incumbent LEC shall "provide * * * interconnection with" its network as requiring the incumbent only to "'make a plug-in available' *for* connection with the CLEC's facilities and equipment," not "to 'lease a physical facility (or wire) *to* the CLEC.'" Pet. App. 33a. The court drew a distinction between an "entrance facility" and an "interconnection facility," which it understood to be a separate facility that allows a competitor to "plug into" an incumbent's network at "the ILEC's designated connection point." *Id.* at 37a. The court stated that an incumbent "has no obligation to provide any entrance facility." *Id.* at 38a (emphasis omitted). Instead, it believed that the "most plausible reading of the plain language of the *TRRO* is that the ILEC must allow the CLEC to connect its network to the ILEC's network, and may not charge the CLEC more than [cost-based] rates for this connection." *Id.* at 37a. The court concluded that "the link * * * between the ILEC's designated connection point and the ILEC's network" does not constitute an interconnection facility.

and therefore need not be made available at cost-based rates, unless "the ILEC requires the CLEC to connect at some point other than directly into its network." *Ibid.* In so holding, the court rejected the FCC's understanding of the *Triennial Review Remand Order* as "so plainly erroneous" that the court could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." *Id.* at 11a n.6.

The court of appeals acknowledged that its decision conflicted with decisions of the Seventh and Eighth Circuits. Pet. App. 33a-37a. Those circuits (and the Ninth Circuit, in a subsequent decision) have construed Paragraph 140 of the *Triennial Review Remand Order*, in which the FCC referred to the "right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)," 20 F.C.C.R. at 2611, to mean that incumbent LECs "must allow the use of entrance facilities for interconnection" at cost-based rates, *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (7th Cir. 2008); accord *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009); *Pacific Bell*, 621 F.3d at 843-847. The court of appeals found the Seventh and Eighth Circuit decisions unpersuasive, however, because it understood them as "assuming the very question to be decided"—namely, that "interconnection facilities" and "entrance facilities" are the same thing. Pet. App. 33a.

b. Judge Sutton dissented. Pet. App. 39a-51a. He observed that the majority's view of the FCC's order and rules "may be a reasonable interpretation," but he argued that "[s]o too * * * is the FCC's competing interpretation, one premised on an interpretation of its own regulations and one that we must respect as a re-

sult." *Id.* at 39a. "In the final analysis," Judge Sutton concluded, "the FCC's interpretation reasonably respects the words of its regulations and [*Auer* v. *Robbins*, 519 U.S. 452 (1997)] requires us to respect that interpretation." *Id.* at 51a.

SUMMARY OF ARGUMENT

In 47 U.S.C. 251(c)(2) and (3), Congress adopted two distinct mechanisms to promote competition in local telephone markets. Section 251(c)(2) requires incumbent carriers to provide interconnection to their competitors at cost-based rates, making it possible for the customers of a competitive carrier to call (and receive calls from) an incumbent's larger customer base. Separately, Section 251(c)(3) requires incumbents to provide certain network elements on an unbundled basis, thus enabling competitors to assemble their own telecommunications networks by combining elements from various sources, including incumbents' networks.

When it adopted the *Triennial Review Remand Order*, 20 F.C.C.R. 2533 (2005), the FCC concluded that incumbents would not be required to make entrance facilities available to their competitors as unbundled network elements under Section 251(c)(3). In the same order, however, the Commission stated that its determination did "not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)," and that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *Id.* at 2611 ¶ 140. Under the *Triennial Review Remand Order*, an incumbent must make entrance facilities available to a competitor at cost-based rates when the competitor seeks to use those facilities to

interconnect with the incumbent's network. In reaching a contrary conclusion, the court of appeals committed three fundamental errors.

First, the court of appeals failed to appreciate that the FCC's orders treat the same facilities differently depending on the purpose for which they are used. The *Triennial Review Remand Order* makes clear that an incumbent is not categorically obligated to make entrance facilities available at cost-based rates. Rather, that obligation exists only when entrance facilities are being used as "interconnection facilities." The court of appeals misconstrued the term "interconnection facilities," as used in the Commission's order, to refer to facilities *different from* entrance facilities. In fact, that term simply refers to entrance facilities that are being used for interconnection.

Second, the court of appeals erroneously limited the scope of incumbent carriers' statutory duty to permit interconnection. The court concluded that an incumbent's only interconnection duty is to allow a competitor to "plug in" to its network, and that the incumbent may unilaterally designate the point at which interconnection will occur. That view cannot be reconciled with Section 251(c)(2)(B), which permits the requesting competitive carrier to select "any technically feasible" method and point of interconnection. And, to the extent that the statutory language is ambiguous, the FCC has long construed Section 251(c)(2) to give the competitive carrier, rather than the incumbent, the right to choose among "technically feasible" interconnection points.

Third, the court of appeals conflated the independent obligations imposed on incumbents by Sections 251(c)(2) and (3). Adopting an overly expansive reading of the FCC regulation relieving incumbents from an obligation

to make entrance facilities available as unbundled network elements under Section 251(c)(3), the court erroneously concluded that incumbents have no obligation to make such facilities available for interconnection under Section 251(c)(2).

Each of the court of appeals' errors is traceable in part to the court's failure to give adequate weight to the FCC's reasonable interpretation of the statutes it administers and of its own orders. Because the FCC's interpretation is reasonable, it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and *Auer* v. *Robbins*, 519 U.S. 452 (1997). The court of appeals gave no sound reason for declining to defer to the views expressed in the FCC's amicus brief below, which was submitted at the court's own request. But in any event, the government's brief in *this* Court is entitled to deference under clearly established principles.

ARGUMENT

WHEN A COMPETITIVE LOCAL EXCHANGE CARRIER SEEKS TO USE AN ENTRANCE FACILITY FOR INTERCONNECTION, 47 U.S.C. 251(c)(2) REQUIRES AN INCUMBENT TO LEASE THE FACILITY AT A COST-BASED RATE

Under 47 U.S.C. 251(c)(2), an incumbent local exchange carrier has a "duty to provide" a competitive carrier with "interconnection with the [incumbent's] network," at cost-based rates, "at any technically feasible point within the [incumbent's] network." An FCC regulation implements that provision by directing incumbents to provide competitors with "any technically feasible method of obtaining interconnection * * * at a particular point upon a request." 47 C.F.R. 51.321(a). The issue in this case is whether an entrance facility—a link

owned by an incumbent that connects its network to the network of a competitor—must be made available at cost-based rates when the competitor seeks to use it for interconnection. The court of appeals held that no such obligation exists. The effect of the court's ruling is that, even when a competitor seeks to use an entrance facility for interconnection, an incumbent carrier may require as a condition of the lease that the competitor pay a higher, unregulated rate.

In reaching that conclusion, the court of appeals committed a series of errors. The court failed to appreciate that the FCC's orders treat the same facilities differently depending on the purpose for which they are used; it adopted an unduly narrow understanding of the incumbent's statutory obligation to permit interconnection; and it confused the interconnection obligation under Section 251(c)(2) with the unbundling obligation under Section 251(c)(3). At each step of its analysis, moreover, the court erred in failing to afford deference to the Commission's reasonable construction of the statutes it administers and the orders it has adopted.

A. Under The FCC's Orders, Entrance Facilities Must Be Made Available For Interconnection At Cost-Based Rates Even Though They Need Not Be Made Available At Cost-Based Rates For Other Purposes

The FCC has established different rules for competitors' access to an incumbent LEC's entrance facilities depending on how the competitor seeks to use those facilities. Under the *Triennial Review Remand Order*, 20 F.C.C.R. 2533 (2005), an incumbent's entrance facilities are available to competitors as "interconnection facilities" if used for interconnection, even though the same facilities need not be made available for use in back-

hauling as unbundled network elements under Section 251(c)(3). The court of appeals' misunderstanding of the *Triennial Review Remand Order* rests in part on the court's mistaken view that "interconnection facilities and entrance facilities are different things." Pet. App. 32a n.13. In fact, the FCC's orders use the term "interconnection facility" to refer to an entrance facility that is being used for interconnection, not to a distinct type of facility.

1. In the *Triennial Review Order*, 18 F.C.C.R. 16,978 (2003), the FCC made clear that the regulatory treatment of entrance facilities depends on the purpose for which those facilities are used. The agency explained that "[c]ompetitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic," and it determined that "the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *Id.* at 17,203 ¶ 365. The agency made clear, however, that "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *Id.* at 17,204 ¶ 366 (quoting 47 U.S.C. 251(c)(2)) (brackets in original).

When the FCC revisited the treatment of entrance facilities in the *Triennial Review Remand Order*, it did not alter incumbents' Section 251(c)(2) obligation to provide such facilities at cost-based rates for the purpose of interconnection. The agency relied on the "economic characteristics of entrance facilities" to determine that competitors would not be impaired in their ability to

provide service if they lacked unbundled access to such facilities, and it therefore declined to order unbundling under Section 251(c)(3). 20 F.C.C.R. at 2610 ¶ 138. The FCC emphasized, however, that under Section 251(c)(2), incumbents remain subject to an independent duty to make entrance facilities available at cost-based rates when competitors seek to use them for interconnection. Specifically, in Paragraph 140 of the *Triennial Review Remand Order*, the FCC stated:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent they require them to interconnect with the incumbent LEC's network.

Id. at 2611 ¶ 140 (footnote omitted).

Although the *Triennial Review Remand Order* did not expressly distinguish between backhauling and interconnection, the agency had no need to draw that contrast because the order, by its terms, did not "alter" the usage-based distinctions set out in the earlier *Triennial Review Order*. *TRRO*, 20 F.C.C.R. at 2611 ¶ 140. And although the D.C. Circuit had vacated the *Triennial Review Order* in its *USTA* decision, the court had addressed only the FCC's conclusion that entrance facilities could not be "network elements" for purposes of Section 251(c)(3). As the Ninth Circuit has correctly recognized, the court in *USTA* "did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities

at [cost-based] rates." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 846 n.15 (2010), petition for cert. pending, No. 10-838 (filed Dec. 23, 2010); see *MAP Mobile Comme'ns, Inc. v. Illinois Bell Tel. Co.*, 24 F.C.C.R. 5582, 5592 ¶ 30 (Enforcement Bureau 2009) (explaining that the discussion of entrance facilities in the *Triennial Review Order*, "which was remanded on appeal, involved unbundling obligations * * *, not charges for interconnection") (footnote omitted).

Accordingly, entrance facilities are "interconnection facilities," as that term is used in the *Triennial Review Remand Order*, when they are being used for interconnection. Under Section 251(c)(2), "competitive LECs will have access to these facilities at cost-based rates to the extent they require them to interconnect with the incumbent LEC's network." *TRRO*, 20 F.C.C.R. at 2611 ¶ 140.

2. In concluding that entrance facilities should not be available as unbundled network elements when used to backhaul traffic, but should remain available for interconnection at cost-based rates when used as a competitive LEC's physical link with the incumbent's network for the mutual exchange of traffic, the *Triennial Review Order* and *Triennial Review Remand Order* were consistent with well-established FCC precedent. The Commission has long recognized that a single facility can be used for different functions, and that its regulatory treatment can vary depending on the use to which it is put. Indeed, the agency's regulations implementing Sections 251(c)(2) and 251(c)(3) frequently make such usage-based distinctions.

In other provisions of the *Triennial Review Remand Order*, for example, the FCC prohibited the use of

unbundled network elements "for the exclusive provision of mobile wireless services or interexchange [*i.e.*, long-distance] services." 47 C.F.R. 51.309(b); see *TRRO*, 20 F.C.C.R. at 2551-2558 ¶¶ 34-40. At the same time, the agency permitted "[a] requesting telecommunications carrier that accesses and uses an unbundled network element consistent with" that restriction to "provide any telecommunications services over the same unbundled network element." 47 C.F.R. 51.309(d). Thus, as with entrance facilities, the FCC's rules regulate access to network elements based on use: A competitive LEC may use an unbundled network element to provide local telephone service, even though the competitor may not use the same facility exclusively to provide long distance or mobile wireless services.

Similarly, 47 C.F.R. 51.305(b) prohibits a competitive LEC from requesting interconnection under Section 251(c)(2) "solely for the purpose of originating or terminating its interexchange traffic [*i.e.*, long distance traffic] on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service [*i.e.*, local telephone service], exchange access service [*i.e.*, network access], or both." Although "the same exact wire" could be used for both purposes, Pet. App. 29a, the FCC's rule prohibits the use of the interconnection arrangement for terminating long distance traffic, but permits its use to offer local telephone service. In upholding that aspect of the FCC's rules, the Eighth Circuit noted that "[o]bviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct." *Competitive Telecomms. Ass'n* v. *FCC*, 177 F.3d 1068, 1073 (1997) (*CompTel*). Section 51.305(b) confirms that the court below was wrong in asserting that "neither the FCC nor

any court has ever defined interconnection" in terms of "a particular use of" a facility. Pet. App. 32a.

3. The court of appeals misread Paragraph 140 of the *Triennial Review Remand Order* because it believed that the FCC could not have "used two separate terms—'entrance facility' and 'interconnection facility'—to describe the exact same wire." Pet. App. 29a. The court therefore concluded that "interconnection facilities and entrance facilities are different things," and that the *Triennial Review Order*'s emphasis on the distinction between backhauling and interconnection was intended to "describe and differentiate two types of *facilities* for which [the FCC] had not yet established names." *Id.* at 32a n.13. Contrary to the court of appeals' understanding, both orders make clear that the FCC regulates a single category of facilities—entrance facilities—based on how those facilities are being used.

If (as the court of appeals believed) interconnection facilities were categorically different from entrance facilities, the FCC would have had no reason to discuss interconnection facilities—or to underscore incumbents' continuing obligation to provide them—in Paragraph 140 of the *Triennial Review Remand Order*, which appears in a section of the order entitled "Entrance Facilities." 20 F.C.C.R. at 2609; see *Pacific Bell*, 621 F.3d at 845 (noting that the relevant section of the *Triennial Review Remand Order* "solely discusses the effect of the FCC's finding as to entrance facilities"). Moreover, if incumbents had no obligation to provide entrance facilities at cost-based rates under either Section 251(c)(2) or Section 251(c)(3), regardless of the manner in which entrance facilities are used, there would have been no reason for the agency to distinguish between entrance facilities being used for interconnection and those being used

for backhauling. Yet the Commission did draw such a usage-based distinction. See *TRO*, 18 F.C.C.R. at 17,202-17,204 ¶¶ 365-366. As Judge Sutton explained in his dissent below, "[t]hese points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities." Pet. App. 47a.

B. Section 251(c)(2) Requires An Incumbent To Provide Interconnection At The Point And By The Method Requested By The Competitor Unless It Is Technically Infeasible To Do So

The court of appeals' decision appears to reflect the view that Section 251(c)(2) and the *Triennial Review Remand Order* require an incumbent to do nothing more than "make a plug-in available" for a competitor to connect to its network. Pet. App. 33a; see *id.* at 23a-26a (analogizing an "interconnection facility" to "an electrical outlet in your garage" and an entrance facility to "one of those big orange extension cords"). The court also read the *Triennial Review Remand Order* to allow the incumbent to determine unilaterally where interconnection will take place. *Id.* at 37a-38a. In both respects, the court misinterpreted Section 251(c)(2) and the FCC order.

1. Section 251(c)(2) requires an incumbent "to provide * * * interconnection" to a requesting competitor "at any technically feasible point within the carrier's network." 47 U.S.C. 251(c)(2). Since the enactment of the 1996 Act, the FCC has consistently construed that provision to mean that an incumbent may be required to provide facilities to a competitor in order to link the two carriers' networks. As the Commission explained in its 1996 *Local Competition Order*, "Congress intended to obligate the incumbent to accommodate the new en-

trant's network architecture by requiring the incumbent to provide interconnection 'for the facilities and equipment' of the new entrant." 11 F.C.C.R. 15,499, 15,605 ¶ 202. The agency recognized that "incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network." *Ibid.* As a result, "[i]f incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated." *Ibid.* In light of the technical limitations of incumbents' existing networks, the FCC found that vindicating the rights of competitors to obtain interconnection at any technically feasible point could require "novel use of" and "modification to" incumbents' facilities—for which the competitors would pay the incumbents' costs plus a reasonable profit. *Ibid.* The *Local Competition Order* and the implementing rule it adopted therefore require an incumbent to provide interconnection not just at any feasible point, but by "any technically feasible method." 47 C.F.R. 51.321(a) and (b).[6]

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[6] The FCC's interconnection rules, which were adopted in 1996, do not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2). That is because, until 2003—when the FCC eliminated unbundled access to entrance facilities in the *Triennial Review Order*—a competitive LEC typically would elect to order a cost priced entrance facility under Section 251(c)(3) since an unbundled network element can be used more expansively than the same facility provided solely for interconnection under Section 251(c)(2). *See Local Competition Order*, 11 F.C.C.R. at 15,636-15,637 ¶ 270 ("Subsection (c)(3) • • • allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection."); *TRO*, 18 F.C.C.R. at 17,203 ¶ 365 n.1113 (same). Only after the FCC eliminated access to entrance facilities as

Once the *Triennial Review Remand Order* reestablished that entrance facilities are part of the incumbent's network, the governing standard under Section 251(c)(2) became whether providing competitive LEC's access to those entrance facilities for interconnection is technically feasible. 47 U.S.C. 251(c)(2)(B); see *Local Competition Order*, 11 F.C.C.R. at 15,602-15,607 ¶¶ 198-206. Respondent has not disputed that the feasibility standard is satisfied here. As the Seventh Circuit has observed, an entrance facility "meets the requirement of feasibility" because it is "designed for the very purpose of linking two carriers' networks." *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (2008); see *Pacific Bell*, 621 F.3d at 844; *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 681 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009).

2. The court of appeals erred in holding that Section 251(c)(2) never obligates an incumbent "to lease a physical facility (or wire) *to* the" competitive LEC. Pet. App. 33a (internal quotation marks omitted). To the contrary, the FCC and the courts have consistently interpreted Section 251(c)(2) to require incumbents to provide a range of facilities to allow interconnection—including, in some circumstances, constructing new facilities where none already exist. See, *e.g.*, *CompTel*, 117 F.3d at 1071-1072 (affirming FCC's interpretation of Section 251(c)(2) as requiring an incumbent LEC to provide "a physical link, between the equipment of the carrier seeking interconnection and the LEC's network"); *US West Commc'ns, Inc. v. Minnesota Pub. Utils. Comm'n*, 55

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unbundled network elements did it have occasion to clarify, in the *Triennial Review Order* and the *Triennial Review Remand Order*, that Section 251(c)(2) gives competitive LECs a right of access to such facilities for interconnection at cost-based rates.

F. Supp. 2d 968, 982-983 (D. Minn. 1999) (affirming state commission order requiring incumbent to provide existing transmission facilities or build new ones to comply with Section 251(c)(2)); cf. *AT&T Corp.* v. *FCC*, 317 F.3d 227, 234-235 (D.C. Cir. 2003).

In the *Local Competition Order*, for example, the FCC determined that a "meet-point arrangement" is one of many "methods of technically feasible interconnection or access to incumbent LEC networks." 11 F.C.C.R. at 15,780-15,781 ¶ 553; see 47 C.F.R. 51.321(b). Meet-point arrangements require an incumbent to build a transmission facility from its network to a designated meet point with a competitor "for the mutual exchange of traffic." *Local Competition Order*, 11 F.C.C.R. at 15,781 ¶ 553; see 47 C.F.R. 51.5. "[E]ach party" to such an arrangement "pays its portion of the costs to build out the facilities to the meet point," a negotiated point between each carrier's respective network. *Local Competition Order*, 11 F.C.C.R. at 15,781 ¶ 553. In its discussion of interconnection through "meet point[s]," the FCC explained that "the limited build-out of facilities" from the incumbent's network "constitute[s] an accommodation of interconnection." *Ibid.* Recognizing that "the creation of meet point arrangements may require some build out of facilities by the incumbent," the FCC nonetheless found "that such arrangements are within the scope of the obligations imposed by section[] 251(c)(2)." *Ibid.*

When compared with that requirement, which has been implemented successfully throughout the telephone industry, the obligation to make entrance facilities available for interconnection is a modest one. A meet-point arrangement requires an incumbent to build a new segment of a dedicated transport facility at its own expense in order to interconnect with a competitor.

In those circumstances, it receives no interconnection compensation from the competitor. By comparison, under the *Triennial Review Remand Order*'s interpretation of Section 251(c)(2), an incumbent is only required to lease to a competitor, at a cost-based rate, an existing facility that is already part of its network.[7]

3. The court of appeals also erred in holding that an incumbent may choose whether to treat a facility as an entrance facility or an interconnection facility. See Pet. App. 47a (Sutton, J., dissenting). According to the court, "[i]f the ILEC requires the CLEC to connect at some point other than directly into its network, then the link * * * between the ILEC's designated connection point and the ILEC's network is * * * an 'interconnection facility' and the ILEC may charge only [cost-based] rates for the use of that * * * interconnection facility." *Id.* at 37a. By contrast, the court stated that "[a]ny facility * * * outside of the ILEC's designated connection point * * * is *not* itself an 'interconnection facility'; it is an 'entrance facility'" that the ILEC "most assuredly has *no obligation to provide*." *Id.* at 37a-38a. The apparent premise of the court of appeals' analysis

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[7] This case involves existing facilities that respondent leased to competitive LECs as unbundled network elements under Section 251(c)(3) before the *Triennial Review Remand Order* was adopted. Pet. App. 8a (explaining that respondent "had been charging CLECs regulated [cost based] rates for use of * * * entrance facilities" until, "in light of the *TRRO*, [respondent] decided it would henceforth charge higher (*i.e.*, competitive) rates for the entrance facilities it was providing"). The FCC has not ruled on whether an incumbent has a duty under Section 251(c)(2) to build new entrance facilities for a competitor's use. In 2002, however, the agency's staff declined to require an incumbent to "bear[] the cost of building new facilities all the way to [a competitor's] central office location." *In re WorldCom, Inc.*, 17 F.C.C.R. 27,039, 27,109 ¶134 (Wireline Competition Bureau).

is that an incumbent carrier can satisfy its obligation to provide interconnection "at any technically feasible point within the carrier's network," 47 U.S.C. 251(c)(2)(B), by designating a single "technically feasible" point of interconnection, even if it refuses a competitive carrier's request for interconnection at a different point that is also "technically feasible."

That analysis is inconsistent with the text of Section 251(c)(2). If Congress had intended to limit the scope of the interconnection obligation in the manner the court of appeals contemplated, it could have required an incumbent carrier to provide interconnection upon request "at *a* technically feasible point." By instead requiring the incumbent carrier to provide requesting competitors with interconnection "at *any* technically feasible point within the [incumbent] carrier's network," 47 U.S.C. 251(c)(2)(B) (emphasis added), Congress conferred upon requesting carriers the right to choose among technically feasible points of interconnection.

To the extent that the statutory language is ambiguous, the FCC's rules clearly reflect the understanding that the incumbent must provide interconnection at the point in its network chosen by the competitor unless interconnection at that point is technically infeasible. See 47 C.F.R 51.305(e) ("An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible."). With respect to the choice among potential *methods* of interconnection, the FCC's rules similarly provide that "[a]n incumbent LEC that denies a request for a particular method of obtaining interconnection * * * on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection

* * * is not technically feasible." 47 C.F.R. 51.321(d); see *Local Competition Order*, 11 F.C.C.R. at 15,602, 15,605-15,606 ¶¶ 198, 203, 205. The court of appeals' reading of Section 251(c)(2) and the *Triennial Review Remand Order* cannot be reconciled with that long-standing regulatory approach.

By reading the *Triennial Review Remand Order* to permit an incumbent to determine unilaterally how and where competitive LECs may interconnect, the court of appeals effectively rewrote the interconnection regime established by Congress in the 1996 Act and implemented by the FCC thereafter. The text of the statute and years of Commission precedent make clear that the incumbent must make available at cost-based rates both the method and the point of interconnection requested by the competitive LEC, unless the incumbent can demonstrate that the request is technically infeasible.

C. An Incumbent's Interconnection Obligation Under Section 251(c)(2) Is Independent Of Its Unbundling Obligation Under Section 251(c)(3)

The court of appeals perceived a conflict between 47 C.F.R. 51.319(e)(2)(i), which eliminates unbundled access to entrance facilities under Section 251(c)(3), and the FCC's statement in the *Triennial Review Remand Order* that entrance facilities must be offered at cost-based rates when they are being used for interconnection under Section 251(c)(2). Section 51.319(e)(2)(i) states that "[a]n incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. 51.319(e)(2)(i). The court read that provision to establish a categorical rule that an incumbent "is not obligated to provide entrance

facilities at [cost-based] rates," and it therefore concluded that an incumbent "can charge competitive rates for the use of its entrance facilities." Pet. App. 16a; see *id.* at 29a n.12. The court's analysis was flawed.

1. As the FCC made clear in Paragraph 140 of the *Triennial Review Remand Order*, Sections 251(c)(2) and 251(c)(3) impose separate and independent obligations on incumbent LECs. 20 F.C.C.R. at 2611. Although the *Triennial Review Order* and the *Triennial Review Remand Order* amended the unbundling rules, they did nothing to alter the FCC's longstanding interconnection rules. Indeed, as Judge Sutton pointed out, "[i]t would be surprising * * * if the *TRRO* exempted entrance facilities from the pre-existing obligations" in the FCC's interconnection rules "through a novel analysis without comment." Pet. App. 45a.

After explaining the FCC's conclusion that entrance facilities are part of the incumbent's network and therefore fall within the statutory definition of a "network element," the section of the *Triennial Review Remand Order* addressing entrance facilities analyzed whether competitors would be "impair[ed]" without unbundled access to those facilities. 20 F.C.C.R. at 2610-2611 ¶¶ 138-139. Under 47 U.S.C. 251(d)(2), the FCC must make an impairment determination when deciding whether network elements should be classified as unbundled network elements that an incumbent must provide under Section 251(c)(3). No impairment analysis is required, however, in determining an incumbent's interconnection duty under Section 251(c)(2). The *Triennial Review Remand Order*'s discussion of impairment therefore would have been irrelevant to an analysis of an incumbent's interconnection obligations. *See Illinois Bell*, 526 F.3d at 1072 (explaining that the determination

whether an ILEC must charge cost-based rates for interconnection "is not related to the scope of the ILEC's obligations under § 251(c)(3) to furnish unbundled network elements"); accord *Pacific Bell*, 621 F.3d at 844; *Southwestern Bell*, 530 F.3d at 683-684.

Respondent suggests (Br. in Opp. 26) that the FCC's interpretation of Section 251(c)(2) is inconsistent with the Commission's finding, in the course of its impairment analysis under Section 251(c)(3), that "competing LECs do *not* require [cost-based] entrance facilities." As explained above, however, although the statute generally requires an impairment showing for cost-based access to network elements, the duty to provide interconnection at cost-based rates exists so long as interconnection at a particular point is "technically feasible." 47 U.S.C. 251(c)(2)(B). Under Section 251(c)(2), an incumbent carrier's duty to provide interconnection at cost-based rates does not depend on whether the competitive LEC "require[s]" interconnection or would be impaired in its ability to provide service if interconnection were unavailable.

2. Like Paragraph 140 of the *Triennial Review Remand Order*, 20 F.C.C.R. at 2611, the rules promulgated in that order discuss only an incumbent's unbundling obligations, not its duty to provide interconnection. Section 51.319(e)(2)(i), the rule cited by the court of appeals, states that, "in accordance with section 251(c)(3)," 47 C.F.R. 51.319(e), an incumbent "is not obligated to provide a requesting carrier with unbundled access" to entrance facilities, 47 C.F.R. 51.319(e)(2)(i). Nothing in Section 51.319(e)(2)(i) suggests that the rule also applies to an incumbent's separate obligation—embodied in a different rule, codified at 47 C.F.R. 51.305—to provide interconnection under Section 251(c)(2). Accordingly,

the court of appeals erred in holding that Section 51.319(e)(2)(i) "could be rewritten as: an ILEC is not obligated to provide entrance facilities at [cost-based] rates." Pet. App. 16a. As Judge Sutton explained, the court's attempt to rewrite the rule "turns the phrase 'with unbundled access' into a useless appendage." *Id.* at 46a. Properly construed, Section 51.319(e)(2)(i) is not relevant to the interconnection question presented in this case.

D. The FCC's Interpretation Of Section 251(c)(2), And Of Its Own Orders And Rules, Is Entitled To Deference

1. Congress did not directly address the question whether, or under what circumstances, an incumbent's duty to provide "interconnection" under Section 251(c)(2) includes an obligation to provide entrance facilities used to link its network with the network of a competitor. By leaving the term "interconnection" undefined, Congress conferred upon the FCC significant discretion to delineate the scope of an incumbent's interconnection obligation. See 47 U.S.C. 201(b) (authorizing the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter"). The Commission's interpretation of Section 251(c)(2) is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984). See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

2. To the extent that the FCC orders at issue in this case are themselves ambiguous, the agency's authoritative interpretation of those orders is also entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). The court of appeals erred in failing to defer

to the interpretation set out in the FCC's amicus brief below. In any event, the amicus brief for the United States filed in this Court reflects the FCC's considered interpretation of its own rules and orders, and it is entitled to deference under established administrative-law principles.

The court of appeals suggested that the agency's interpretation of the *Triennial Review Remand Order* is not entitled to deference because the order is an "interpretive rule" rather than a "true regulation." Pet. App. 11a. n.6 (internal quotation marks omitted). That is incorrect. The FCC conducted a notice-and-comment rulemaking before it adopted the order. *TRRO*, 20 F.C.C.R. at 2543-2545 ¶¶ 18-19. The order itself contained seven pages of new rules, including the version of 47 C.F.R. 51.319(e)(2)(i) on which the court below relied, 20 F.C.C.R. at 2667 ¶ 239; *id.* at 2677 (App. B), and the agency published a summary of it in the "Rules and Regulations" section of the Federal Register, 70 Fed. Reg. 8940 (2005). As Judge Sutton observed, "[a]ll of this confirms that the *TRRO* is a legislative rule." Pet. App. 50a. The fact that the *Triennial Review Remand Order* was denominated an "order" rather than a "rule" does not alter the deference analysis because the FCC's rulemaking "orders" are legislative acts of the agency. See *Central Tex. Tel. Coop., Inc.* v. *FCC*, 402 F.3d 205, 211 (D.C. Cir. 2005) ("Although the APA defines 'order' as a final disposition other than in a rulemaking, * * * the Commission uses the designation 'order' even when it issues legislative rules after overt § 553 rulemaking."). In any event, it is well settled that an "agency's interpretation of its own precedent," no less than its interpretation of its regulations, "is entitled to deference." *Boca Airport, Inc.* v. *FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004)

(quoting *Cassell* v. *FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)).

The court of appeals also erred in declining (Pet. App. 10a n.6) to give deference to the amicus brief filed by the FCC below. This Court has repeatedly deferred to agency interpretations set forth in briefs and in agency staff memoranda. See, *e.g.*, *Chase Bank USA, N.A.* v. *McCoy*, No. 09-329 (Jan. 24, 2011), slip op. 15 ("Under *Auer*, * * * it is clear that deference to the interpretation in the Board's *amicus* brief is warranted."); *Auer*, 519 U.S. at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."); see also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980). Like an amicus brief filed in this Court, the FCC's Sixth Circuit amicus brief should be assumed to "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; see Pet. App. 48a (Sutton, J., dissenting) ("A deference doctrine that turns on whether a brief was filed in the United States Supreme Court or a court of appeals has little to commend it."). The court's unwillingness to treat that brief as an authoritative statement of the agency's position was particularly unwarranted because the brief was "filed *at the request* of [the] court of appeals." *Id.* at 49a; see *id.* at 48a-49a (explaining that the Sixth Circuit "called for the views of the FCC in order to understand how the agency construed its regulations and to make sure [the court was] not missing something in the process"). In any event, the government's amicus brief in *this* Court is entitled to deference under established administrative-law principles, see *Chase Bank*,

slip op. 12-13, regardless of what weight should have been given to the brief filed below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2011

AMICUS CURIAE BRIEF

Nos. 10-313, 10-329

10

Supreme Court, U.S.
FILED
MAR 8 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN,

Respondent.

ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND GREG R. WHITE, COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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March 8, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach, research, and write in the areas of federal administrative law and procedure. They teach, research, and write about many of the issues in this case, including the proper scope of deference to agencies' interpretations of the statutes and regulations that govern agency conduct. *Amici* submit this brief to demonstrate that the proper scope of deference to administrative statutory and regulatory interpretations should exclude the government's claims for deference in this case.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

[2] While previously in private practice, Mr. Burstein was on the briefs for AT&T California in *Pacific Bell Telephone Co. v. California Public Utilities Commission*, 621 F.3d 836 (9th Cir. 2010). That representation ended before the court of appeals heard argument in the case.

INTRODUCTION AND SUMMARY

This case concerns the proper regulatory treatment of "entrance facilities" under the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations and orders. "Entrance facilities" are cables used to transmit telecommunications traffic between the networks of two different carriers – an incumbent local exchange carrier (LEC) and a competitive LEC. *See* 47 C.F.R. § 51.319(e)(2)(i). The court below held that incumbent LECs are under no duty to provide entrance facilities to competitive LECs at regulated prices known as "TELRIC" rates. *See* Pet. App. 31a-33a.

The court below and the parties offer comprehensive treatments of the regulatory background. *See, e.g.*, Pet. App. 2a-8a; Gov't Br. 2-8; AT&T Br. 2-11. As relevant here, the Act imposes two separate duties on incumbent LECs to facilitate entry by competitive LECs.[3] Under § 251(c)(2) of the Act, the duty at issue here, incumbent LECs must "provide, for the facilities and equipment of any requesting [competitive LEC], interconnection with the [incumbent LEC's] network" at a "technically feasible point within" that network. 47 U.S.C. § 251(c)(2). Under § 251(c)(3), incumbent LECs must "provide, to any requesting [competitive LEC] . . . access to [certain] network elements on an unbundled basis." *Id.* § 251(c)(3). Shortly after the Act's passage, the Commission promulgated regulations implementing those two sections. Those regulations were the

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[3] The Act also imposes on incumbent LECs the duty to "offer for resale at wholesale rates any telecommunications service that the [incumbent LEC] provides at retail," 47 U.S.C. § 251(c)(4), but that duty is not at issue in this case.

subject of extensive litigation over many years in the courts. *See* Pet. App. 3a-5a.[4] Nevertheless, from the Commission's initial rulemaking until its adoption of the *Triennial Review Order*[5] in 2003, the Commission took the position that entrance facilities needed to be provided on an unbundled basis under § 251(c)(3). The Commission reversed course in the *Triennial Review Order* and later adhered to that position, albeit with different reasoning that could withstand judicial review, in the 2005 *Triennial Review Remand Order*.[6]

The question presented in this case is whether incumbents must nevertheless provide entrance facilities to competitors under the separate interconnection duty in § 251(c)(2) of the Act. Prior to this and similar litigation, the Commission had never expressly taken the position that § 251(c)(2) or the Commission's regulations implementing that section required incumbents to provide entrance facilities to competitors. *See* Gov't Br. 22 n.6. Yet in this case, petitioners and the United States ask the Court to give deference to the government's new construction of the Act, the Commission's implementing regulations, and the *Triennial Review* orders. Such deference is inappropriate. The Court has consistently declined to allow agencies to rely on deference

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[4] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by Talk America in No. 10-313.

[5] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

[6] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

doctrines to avoid using formal procedures like notice-and-comment rulemaking when making substantive rules. Each of the government's three possible bases for deference here constitutes just such an end-run around established administrative procedures.

First, the government's position that incumbent LECs must provide competitive LECs with entrance facilities for interconnection under § 251(c)(2) is not eligible for *Chevron* deference because the Commission's statements that purport to articulate that obligation do not have the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 230-32 (2001). Although those statements are found in the *Triennial Review* orders – documents that were the products of notice-and-comment rulemakings – the statements were not themselves subject to that process. The Commission never put any party on notice that it was considering amending its interconnection regulations, never actually amended those regulations, never solicited comments about the question whether incumbent LECs have a duty to provide entrance facilities under § 251(c)(2), and gave no indication that any party needed to petition for review of a new interpretation of § 251(c)(2). On the contrary, the agency in each order said that it was "not alter[ing]" its prior interpretation of § 251(c)(2). *See TRO* ¶ 366; *TRRO* ¶ 140. Granting *Chevron* deference to an interpretation rendered under such circumstances would allow an agency to bypass notice-and-comment procedures by simply tacking its desired statutory interpretations onto the products of unrelated rulemaking proceedings. The Court should not endorse such a rule.

Second, the government cannot reasonably claim that the statements in the *Triennial Review* orders

represent an interpretation of the existing interconnection regulations eligible for deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The Commission's purported rule would constitute an *amendment* of those regulations, not an interpretation. The relevant regulation, 47 C.F.R. § 51.321, articulates a general requirement – that incumbent LECs provide "any technically feasible method of obtaining interconnection," *id.* § 51.321(a) – followed by a specification of two such methods, *id.* § 51.321(b). Well-established principles of administrative law require the Commission to act through notice-and-comment rulemaking to add a third. This Court should not allow the agency to avoid that procedural duty through deference.

Third, the government's interpretations of the *Triennial Review* orders in this litigation do not qualify for *Auer* deference because they do not reflect the agency's "fair and considered" judgment about the meaning of its orders. *Auer*, 519 U.S. at 462. The government makes no attempt to grapple with alternative – and more plausible – readings of the few sentences that it claims impose an obligation on incumbent LECs to provide entrance facilities under § 251(c)(2). The government must undertake a more complete explanation – preferably through rulemaking – of its orders in order to avoid "unfair surprise" to the regulated parties. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

ARGUMENT

I. *CHEVRON* DEFERENCE TO THE FCC'S INTERPRETATION OF SECTION 251(c)(2) IS NOT WARRANTED

In its brief in this Court, the government contends that § 251(c)(2) "includes an obligation [on AT&T's

part] to provide entrance facilities" to competing carriers at cost-based rates upon request. Gov't Br. 30. That interpretation is not eligible for deference under the doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Commission did not render its statutory interpretations under "circumstances reasonably suggesting that Congress ever thought . . . deserving [of] the deference claimed for them." *Mead*, 533 U.S. at 231.

A. *Chevron* Deference Applies Only To Agency Interpretations Made In Accordance With Congressionally-Delegated Authority To Act With The Force Of Law.

In *Chevron*, this Court held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66). But not all agency interpretations are entitled to deference from the Court. In *Mead*, the Court held that an agency's interpretation of a statute qualifies for deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000).

Underlying *Mead*'s restriction of the scope of *Chevron* deference are two related concerns. First, the Court will only defer to an agency's interpretation of an ambiguous statute when it is clear that Congress has granted the agency "the authority to

promulgate binding legal rules." *Brand X*, 545 U.S. at 980-81; *see also Mead*, 533 U.S. at 230-31 & n.11; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 871-72 (2001). Congress must have delegated to the agency primary interpretive authority over the statute. The procedures that Congress instructs an agency to use furnish one indication that such a delegation has occurred. *See, e.g., Mead*, 533 U.S. at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure.").

An agency exercising its delegated interpretive authority, however, must still do so through administrative procedures designed to produce rules with the force of law. In *Mead* itself, for example, the Court observed that the Customs Service had a "general rulemaking power" by which it could make regulations with the force of law. 533 U.S. at 232. But the interpretations contained in classification rulings promulgated outside that power were not entitled to deference. The Court found it "difficult . . . to see *in the agency practice itself* any indication that [the agency] ever set out with a lawmaking pretense in mind" when it made the interpretations. *Id.* at 233 (emphasis added). Those interpretations were not themselves subject to the rigors of notice and comment, were of limited precedential value, and were issued with little deliberation. *See id.* at 233-34.

In short, administrative interpretations only have the force of law – only are eligible for deference – when they reflect "the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the*

Administrative State, 78 N.Y.U. L. Rev. 461, 538 (2003) ("Agencies may possess only so much authority (1) as Congress may grant them, and (2) as they may exercise consistent with the value of fairness, rationality, and predictability.").

Although the Court may draw some inferences about the fairness and deliberation with which an agency has rendered an interpretation — and, therefore, the interpretation's authority — from the formality of the procedures the agency employed, the Court has repeatedly noted that the inquiry does not end there. Interpretations found in relatively informal pronouncements such as "opinion letters," "policy statements, agency manuals, and enforcement guidelines" usually are ineligible for *Chevron* deference. *Christensen*, 529 U.S. at 587. But not always. *See, e.g.*, *Mead*, 533 U.S. at 230 & n.13 (citing *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995)).

Similarly, "the *presence* or absence of notice-and-comment rulemaking" is not "dispositive." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (emphasis added). What matters instead, among other things, is "the careful consideration the [a]gency has given the question." *Id.* To be eligible for deference, the agency at a minimum must have engaged in a rigorous analysis of the relevant law and policy in a relatively formal proceeding and give precedential effect to such formal determinations. *See, e.g.*, *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001).

B. The FCC Did Not Articulate An Interpretation Of Section 251(c)(2) That Has The Force Of Law.

There is no doubt that the Commission has "the authority to promulgate binding legal rules." *See Brand X*, 545 U.S. at 980-81; 47 U.S.C. §§ 151, 201(b). In this case, however, it did not exercise that authority. *Contra Brand X*, 545 U.S. at 981. The Commission asserts that its interpretations can be found in one sentence of ¶ 366 of the *Triennial Review Order*[7] and two sentences of ¶ 140 of the *Triennial Review Remand Order*.[8] *See* Gov't Br. 16-18. Those sentences, however, are not themselves legislative rules and do not carry the force of law.

The government itself concedes that, "[a]lthough the *Triennial Review Order* and the *Triennial Review Remand Order* amended the unbundling rules, they did nothing to alter the FCC's longstanding interconnection rules." Gov't Br. 28. Indeed, had the Commission attempted to set forth a rule in the *Triennial Review Order* or the *Triennial Review*

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[7] That sentence reads: "In reaching this determination we note that, to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *TRO* ¶ 366 (footnote omitted).

[8] Those sentences read: "We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *TRRO* ¶ 140 (footnote omitted).

Remand Order that incumbent LECs had to provide entrance facilities to competitors under § 251(c)(2), it would have violated the Administrative Procedure Act's (APA) notice-and-comment procedures. Section 553 of the APA provides that before promulgating a rule, an agency must provide notice of "either the terms or substance of the proposed rule or a descriptions of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The agency must then allow interested persons the opportunity to comment on the subjects delineated in the notice. *Id.* § 553(c).

In this case, the notices of proposed rulemaking gave no indication that the Commission was preparing to render an interpretation of § 251(c)(2). Neither notice even cited that provision.[9] Instead, the notices confined themselves primarily to seeking comments on proposed changes to the FCC's unbundling regulations that implemented § 251(c)(3). No party therefore could reasonably have been expected to comment on whether entrance facilities comprised part of incumbent LECs' obligation to provide interconnection under § 251(c)(2). In all events, the Commission's sentences themselves do nothing to establish such a rule. In the *Triennial Review Order*, the Commission merely observed that competitive LECs may require certain "facilities" for interconnection with incumbent LEC networks and stated that it was not "alter[ing]" its interpretation of § 251(c)(2). So too in the *Triennial Review Remand Order*, the Commission simply reiterated that its amendment of the unbundling rules "does not alter"

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[9] *See* Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd. 22781 (2001) ("*TRO NPRM*"); Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, 19 FCC Rcd. 16783 (2004) ("*TRRO NPRM*").

competitive LECs' rights to interconnection under § 251(c)(2). These sentences appear on their face to be mere clarifications rather than rules. Indeed, this language gives no indication – as would ordinarily be the case for a binding legislative rule – that any party was under an obligation to petition for review of the FCC's interpretation. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a).

The government's contention (at 31) that the Commission's orders are "legislative acts" does not change the analysis. It is well established that the FCC can promulgate legislative rules (through either rulemaking or adjudication) that are not codified in the Code of Federal Regulations. *See, e.g., Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 142-43 (D.C. Cir.) (upholding FCC "rules" contained in series of orders but not codified), *cert. denied*, 131 S. Ct. (2010). But in order for interpretations contained in those rules to have the force of law, they must still be subjected to the "fairness and deliberation" that *Mead* insists accompany "a pronouncement of such force." *Mead*, 533 U.S. at 230. Regardless whether *other* sections of the *Triennial Review Order* or the *Triennial Review Remand Order* may satisfy that test and be entitled to *Chevron* deference, the sentences for which the Commission claims deference in this case bear none of the hallmarks of interpretations that, under *Christensen* and *Mead*, have the force of law.

Similarly, it is of no moment that these sentences are to be found in a document that otherwise may have complied with notice-and-comment procedures. In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), for example, this Court considered whether deference to the Food and Drug Administration's interpretation of the scope of its preemption authority was warranted.

The notice of proposed rulemaking in that case stated that the agency was not considering "'policies that have federalism implications or that preempt State law,'" and therefore did not seek comment on the scope of permissible preemption. *Id.* at 1201 (quoting 65 Fed. Reg. 81,103 (Dec. 22, 2000)). Yet the final rule the agency promulgated "articulated a sweeping position on the [Food, Drug, and Cosmetic Act's] pre-emptive effect in the regulatory preamble." *Id.* The Court declined to find those pronouncements eligible for *Chevron* deference in part because the agency's "procedural failure" made their authority "inherently suspect." *Id.*

So too in this case, the Commission failed to adopt its interpretation through procedures "reasonably suggesting that Congress ever thought of [such pronouncements] as deserving the deference claimed for them here." *Mead*, 533 U.S. at 231. To accord *Chevron* deference in the circumstances described above would be to invite agencies to avoid using such procedures – notice-and-comment rulemaking in particular – simply by including new language in final rules. The scope of *Chevron* deference cannot reach so far.

II. THE FCC'S INTERPRETATIONS OF ITS OWN REGULATIONS IN THIS CASE DO NOT QUALIFY FOR DEFERENCE UNDER *AUER*

In *Auer*, this Court held that an agency's interpretation of its own regulations – even in an *amicus* brief – is owed deference unless the interpretation is "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (internal quotation marks omitted); *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Court has appropriately limited the scope of *Auer* deference, however, to ensure that agencies do not circumvent formal processes of articulating rules and making policy. An agency receives no deference when it interprets a regulation that merely recites the statutory language; in that circumstance it must rely on processes with the force of law, as described above. *See Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). Neither can an agency, "under the guise of interpreting a regulation, . . . create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. That is, agency interpretations of ambiguous regulations are entitled to deference because it is presumed that an agency is best placed to interpret its own words. But an agency cannot rightly claim to be "interpreting" a regulation when it is in fact *changing* that regulation. Finally, the Court has cautioned that an agency's interpretation of its own regulations will not be accorded deference unless it "reflect[s] the agency's fair and considered judgment on the matter in question," *Auer*, 519 U.S. at 462, and does not work any "unfair surprise," *Long Island Care at Home*, 551 U.S. at 170. The Court reaffirmed these principles just this Term in *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881-82 (2011). As the Court explained, deference ultimately depends on all "the circumstances of th[e] case." *Id.* at 884 (quoting *Auer*, 519 U.S. at 462).

Together, the limitations described above ensure that agencies produce rules and interpretations of those rules that are sufficiently "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). They also ensure that agencies do not exceed their delegated powers by

avoiding notice-and-comment rulemaking. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996) ("[O]ne must assess [*Seminole Rock*'s] validity in light of the incentives that it supplies to an agency engaged in rulemaking."); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 110-11 (1995) (O'Connor, J., dissenting).

A. The Commission Does Not Validly Interpret An Existing Regulation.

The Commission does not specify – in the *Triennial Review Order*, the *Triennial Review Remand Order*, or in its briefing in this litigation – any particular interconnection regulation that is susceptible of a deference-worthy interpretation. Indeed, neither *Triennial Review* order cites any interconnection regulation in the passages that the government now claims establish a rule that incumbent LECs must provide entrance facilities to competitors under § 251(c)(2).

The most likely candidate to support the government's interpretation is 47 C.F.R. § 51.321, although the government only cites the rule in passing (at 3, 14, 22, 24) and does not claim to be interpreting that rule. Section 51.321 announces a general requirement that incumbent LECs "provide . . . any technically feasible method of obtaining interconnection . . . at a particular point" to competitors upon request. 47 C.F.R. § 51.321(a). The regulation then explains that "[t]echnically feasible methods of interconnection . . . include, but are not limited to" two particular arrangements: "[p]hysical collocation and virtual collocation at the premises of an incumbent LEC" and "[m]eet point interconnection arrangements." *Id.* § 51.321(b).

To the extent the Commission is understood as "interpretating" this regulation, the claim must be that entrance facilities are a "technically feasible method of interconnection," within the general obligation in § 51.321(a). But that is not an *interpretation* of the regulation. It is an *amendment* of the regulation. The regulation articulates a broad standard followed by two specific instances of that standard. The specific instances are articulated prospectively and meant to bind all potential entities that are subject to the regulation. They are classic legislative rules. *See* 5 U.S.C. § 551(4) (defining "rule" as "the whole or part of an agency statement of general or particular applicability and future effect"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that agency "interpretation" was a "rule" because it "reads like a ukase," "[i]t commands, it requires, it orders, it dictates"); *see also* Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1485 (1992).

As the Seventh Circuit has explained, unless a rule "can be derived from the regulation by a process reasonably described as interpretation," it is an amendment. *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996) (Posner, J.). Arbitrarily specifying one particular instance of a general standard – as the government seeks to do here – is not interpretation. *See id.* at 171 ("There is no process of cloistered, appellate-court type reasoning by which the [agency] could have excogitated the [particular] rule from the [general] regulation."). In the absence of *interpretive* reasoning, the agency's choice must be justified by reference to policy concerns. Those concerns in turn must be articulated in notice-and-comment rule-makings or other agency actions that similarly require rigorous deliberation. If the Commission

wanted to add another category of "technically feasible methods of . . . interconnection" to the list in Rule 51.321(b), it needed to do so through those procedures. *See Appalachian Power*, 208 F.3d at 1024 ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.").

Auer deference is inappropriate when, as here, an agency's "interpretation" amounts to an amendment. "To defer to the agency's position" in such circumstances, "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. Lower courts have refused to grant *Auer* deference in similar circumstances. In *Hoctor*, for example, the court held that because the agency's interpretation was really an amendment, it could not be given "'controlling weight.'" 82 F.3d at 169 (quoting *Stinson v. United States*, 508 U.S. 36, 44-46 (1993)); *see id.* at 170-72. Other courts have reached similar conclusions. *See, e.g., United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004) ("The Department is free to interpret reasonably an existing regulation without formally amending it; but where . . . the interpretation has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment – is the proper course."); *Mission Grp. Kan., Inc. v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (declining to apply *Auer* deference to interpretive specification of "'any additional condition'" language in regulation); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324-25 (3d Cir. 1987) (refusing to defer to "a mere position about what the regulations require"

rather than "a reasoned interpretation of a regulation's language").

Indeed, to hold otherwise would be to invite agencies to "replace statutory ambiguity with regulatory ambiguity, thus creating . . . deference for any administrative action that might be squeezed within the unrestricted terms of a promulgated regulation." *Mission Grp.*, 146 F.3d at 782; *see also* Manning, *supra*, at 655 ("[A]n agency's right of self-interpretation should have an untoward effect upon its incentive to speak precisely and transparently when it promulgates regulations.").

B. The FCC's Interpretations Of The *Triennial Review Order* And *Triennial Review Remand Order* Are Not Entitled To Deference.

Alternatively, the Commission asserts that its interpretations of the *Triennial Review* orders in the course of this litigation are themselves subject to deference under *Auer*. Gov't Br. 30-31. The agency's position in this litigation is, in part, that ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order* require that an "incumbent's entrance facilities [be made] available to competitors as 'interconnection facilities' if used for interconnection." Gov't Br. 15. But the government has not – either in the court below or in this Court – advanced any reasoning sufficient to explain how it derives that rule from the few sentences it cites from the *Triennial Review* orders. The government's litigating position therefore cannot be said to "reflect the agency's fair and considered judgment" regarding the proper interpretation of the *Triennial Review* orders. *Auer*, 519 U.S. at 462.

In its brief in the court below, the Commission did little more than recite the language of ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order*. *See* Pet. App. 137a. The Commission did not explain *how* that language could be read to impose an obligation on incumbent LECs to provide entrance facilities to competitors for interconnection. Indeed, the Commission *conceded* that it "did not specifically define what it meant by the term 'interconnection facilities.'" *Id.* at 138a. Yet in the same sentence the Commission simply asserted – without any additional explanation – that the Michigan Public Service Commission's "interpretation of that term" was "fully consistent with the FCC's finding in the *TRRO*." *Id.* The Commission did not specify the "finding" to which it referred.

The government's brief in this Court still does not provide a "fair and considered" explanation of that rule, *Auer*, 519 U.S. at 462. The government argues that the court of appeals misread the *Triennial Review Remand Order*, but offers little competing interpretation. Gov't Br. 15-16.

The government asserts, for example, that "the FCC's orders use the term 'interconnection facility' to refer to an entrance facility that is being used for interconnection." *Id.* at 16. But ¶ 140 of the *TRRO* appears on its face to draw a distinction between the "entrance facilities" that the Commission deemed unavailable as unbundled network elements in the preceding paragraphs, and "interconnection facilities" that competitive LECs are entitled to pursuant to § 251(c)(2). The government does not explain why the Commission would have chosen to use different terms for the same thing in the same paragraph, does not even attempt to justify its interpretation of the paragraph in light of a more natural reading, and

does not explain why it told the court below that it had left the term undefined (*see* Pet. App. 138a).

Similarly, ¶ 140 provides that competitive LECs "will have access to these [interconnection] facilities . . . to the extent that they *require* them to interconnect with the incumbent LEC's network." *TRRO* ¶ 140 (emphasis added).[10] In its briefing, the government now appears to treat the word "require" as though it means "request." *See* Gov't Br. 26-27. But the government makes no attempt to explain how such a transformation of the language of the *Order* can be accomplished.

Finally both ¶ 140 and ¶ 366 of the *Triennial Review Order* state that the Commission is not "alter[ing]" its interpretation of the underlying statute, 47 U.S.C. § 251(c)(2). But the government does not explain the content of the interconnection obligation, as it existed at the time of the *Triennial Review* orders. On the contrary, the government concedes that, prior to the *Triennial Review Order*, its "interconnection rules . . . [did] not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)." Gov't Br. 22 n.6.

Affording deference to the interpretation proffered here would mark a significant expansion of the scope of *Auer* deference. This case is a far cry from the typical case where *Auer* deference is appropriate. In *Chase Bank*, for example, the Court considered whether certain increases in credit card interest rates constituted "change[s] in terms" under the Federal

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[10] The *Triennial Review Order* similarly referred only to facilities that competitive LECs "*need* . . . in order to interconnect" with incumbent LECs. *TRO* ¶ 366 (emphasis added; internal quotation mark and alteration omitted).

Reserve Board's Regulation Z. 131 S. Ct. at 879-80 (citing 12 C.F.R. § 226.9). In that case, the court concluded that a single phrase in a codified regulation was ambiguous, *see id.*, and deferred to the government's choice among two reasonable constructions, which the government had articulated consistently in briefs in the court of appeals and this Court. *See id.* at 880-81 & n.8. Similarly, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), the Court deferred to an agency interpretation of a single codified regulation that the Court itself found to be ambiguous because the agency provided "an instructive interpretive step" in explaining the regulation. *Id.* at 2473 (citing 40 C.F.R. § 122.3). In this case, by contrast, the government seeks deference to several narrative sentences in two distinct orders, unmoored from any codified regulation. The government does not explain how those sentences are ambiguous, what the competing constructions are, why one construction is better in its judgment than another, or why its position before the Sixth Circuit differed from its position here.

In short, the government's proposed rule poses a significant risk of "unfair surprise" to entities regulated under the Communications Act. *Long Island Care at Home*, 551 U.S. at 170. Regulated entities reading the text of the *Triennial Review* orders would have had little reason to expect that the three sentences at issue in those orders would yield a rule requiring incumbents to provide competitors with entrance facilities for interconnection. To derive that rule from ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order* requires the kind of analysis most likely to be carried out in notice-and-comment rulemaking. *Cf. Long*

Island Care at Home, 551 U.S. at 170-71 (finding no "unfair surprise" when agency pursued parallel notice-and-comment rulemaking); *Boose v. Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009) (same).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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March 8, 2011

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 3 - 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

MICHIGAN BELL TELEPHONE COMPANY
d/b/a AT&T MICHIGAN,

Respondent.

ORJIAKOR N. ISIOGU, MONICA MARTINEZ,
and GREG R. WHITE, Commissioners of
the Michigan Public Service Commission,

Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
d/b/a AT&T MICHIGAN,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF PETITIONERS

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February 3, 2011

(WARREN LAW BRIEF PRINTING CO., 800 225-6964
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1558
(11)

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae California Public Utilities Commission (CPUC or amicus) is the state agency in California that regulates privately owned telecommunications, electric, natural gas, water, railroad, and passenger transportation companies. The CPUC is the respondent in a pending petition for a writ of certiorari in the United States Court of Appeals for the Ninth Circuit filed by AT&T California, an affiliate of Respondent Michigan Bell Telephone Co. (AT&T Michigan). *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3403 (U.S. Dec. 23, 2010) (No. 10-838). The question presented here is the same as that presented in the Ninth Circuit *Pacific Bell* petition. The CPUC submits this brief in continued support of both its decision at issue in the Ninth Circuit petition and, more broadly, the promotion of competition in local telecommunications services pursuant to section 251 of the Telecommunications Act of 1996 (the Act).

The CPUC has the consent of the parties to file this brief. On December 20, 2010 and January 4, 2011, respectively, Petitioners Isiogu, Martinez, and

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[1] Amicus California Public Utilities Commission and its counsel listed on the front cover authored this brief. No party or its counsel had any part in authoring this brief. No one other than amicus California Public Utilities Commission or its counsel has made any monetary contribution to the preparation or submission of this brief.

White and Petitioner Talk America Inc. (Talk America) sent letters to the Clerk of the Court giving consent to any amicus curiae brief. Respondent AT&T Michigan's December 20, 2010 letter indicating its consent is being filed concurrently with this brief.

STATEMENT

Telephone Networks and Entrance Facilities. In the current local telecommunications market, incumbent local exchange carriers (ILECs) have their own separate infrastructures of wires and switches (computers that direct calls to their destinations), called networks, to move calls from one caller to another within their respective networks. Competitive local exchange carriers (CLECs) often have their own networks as well. A CLEC with its own network "interconnects" its network with an ILEC's network to allow customers of the two different companies to talk to one another. A CLEC without its own network either leases part or all of an ILEC's network or purchases telecommunications service from an ILEC and resells that service to its customers.

The telecommunications equipment at issue in this case is called an "entrance facility." An entrance facility is a type of transmission facility (*i.e.*, a high capacity wire) that connects ILEC and CLEC networks, such that telephone traffic can transfer

seamlessly from one carrier's network to another. *Triennial Review Remand Order (TRRO)* ¶ 136;[2] *Pacific Bell*, 621 F.3d at 841-42, 844; *Michigan Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 372 (6th Cir. 2010), Pet. App. 3a.[3] The connection can be long or short, and multiple carriers' switches may be in the same building (known as "collocation"). *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008), Pet. App. 82a.

Interconnection: One of the Two Uses of Entrance Facilities. Entrance facilities have two different uses, which neither AT&T Michigan nor AT&T California disputes. *See, e.g.*, Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 6 n.9, *Michigan Bell*, 597 F.3d 370 (6th Cir. 2010) (Nos. 07-2469, 07-2473), 2008 WL 5098822[4] (the same entrance facility "can be used for multiple purposes"); Br. of Appellant AT&T Cal. at 4, *Pacific Bell*, 621 F.3d 836 (9th Cir. 2010) (Nos. 08-15568, 08-15716), 2008 WL 3312433, at *4 ("CLECs can use entrance facilities in two different ways.").

First, for the telephone system to function, carriers must be able to "interconnect" – that is, calls

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[2] Order on Remand, *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 20 FCC Rcd. 2533 (2005), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[3] References to "Pet. App." are to the Appendix to Talk America's petition in No. 10-313.

[4] No Westlaw star pagination is available for this document.

must be able to move from one carrier's customer (located in that carrier's network) to another carrier's customer (located in the second carrier's network). This practice originated over one hundred years ago when local telephone companies interconnected so that their respective customers could call each other. *See Pacific Bell*, 621 F.3d at 840 ("Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services[.] . . . A local telephone service is of little use if it cannot connect to other local telephone users."); *SBC, Inc. v. FCC*, 414 F.3d 486, 489-90 (3d Cir. 2005) (without interconnection, "customers of one carrier – e.g., the ILEC, that has historically served that area – would not be able to call customers of another carrier – e.g., a [CLEC], that has recently initiated service in that same area"). An entrance facility is a component of interconnection which enables a CLEC to physically connect its equipment to the ILEC's equipment, so that calls can move back and forth between the two networks.

Both AT&T Michigan here and AT&T California in *Pacific Bell* concede that entrance facilities serve this interconnection function. As AT&T Michigan stated, "[e]ntrance facilities are a *common means of achieving interconnection with an incumbent LEC*; AT&T Michigan and its incumbent LEC affiliates provide more than 15,000 entrance facility interconnection arrangements nationwide to competing LECs and wireless carriers today." Br. for Resp't 18 (emphasis added). *See Pacific Bell*, 621 F.3d at 844 ("As the

term 'entrance' implies, entrance facilities provide a way for a competitive LEC's calls to enter AT&T's network and reach AT&T customers, a fact that AT&T concedes."). *See also* Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 6 n.9, *supra* at 3 ("an entrance facility may be used to exchange traffic with the ILEC by connecting the CLEC's switch to the ILEC's switch"); Br. of Appellant AT&T Cal. at 4, *supra* at 3 (CLECs "can use [entrance facilities] to 'interconnect' with the ILEC, to enable the CLEC's customer to call the ILEC's customer (and vice versa)").

As illustrated in Diagram 1 attached (a copy of the diagram the CPUC submitted to the Ninth Circuit in *Pacific Bell*), when CLEC customer C calls ILEC customer A, the call is first connected to the CLEC switch in the CLEC's own network. Then the CLEC's switch sends the call over the entrance facility to the ILEC's switch in the ILEC's switching center (the "tandem office"). The ILEC's switch then routes the call through its own network to its own customer A. App. 1.

Backhaul: The Second Use of Entrance Facilities. A CLEC also can use an entrance facility to transport its own customers' traffic from an ILEC's central office to the CLEC's switch. Using an entrance facility in this fashion – to route traffic to and from a CLEC's end users located in the ILEC's service territory – is known as an example of "backhauling" or "backhaul." *See* Br. for Resp't 25 n.28 (defining backhauling as the CLECs' "use of an entrance facility to connect its own switch to a loop . . . that the

[CLEC] obtained from an [ILEC] as an unbundled element under § 251(c)(3); the [CLEC] then uses its switch to provide telephone service to the customer connected to the unbundled loop"); AT&T Cal.'s Pet. for Panel Reh'g & Suggestion for Reh'g En Banc at 8, *Pacific Bell*, 621 F.3d 836 (9th Cir. 2010) (Nos. 08-15568, 08-15716) (to backhaul is "to route calls over ILEC facilities to a CLEC customer").

For example, and referring again to Diagram 1 attached, in order to allow CLEC customer C to call CLEC customer B (located in an ILEC's service area), the call moves from the CLEC's switch in its own network over the entrance facility to the ILEC's tandem office, where the CLEC has collocated equipment pursuant to section 251(c)(6) of the Act. The call then moves to another ILEC switching center (the "end office") where the CLEC also has collocated equipment, and then on to CLEC customer B via the ILEC's local loop (the wire connecting telephones to switches). In this way, the entrance facility is part of a chain of dedicated transmission facilities connecting the CLEC customer to the CLEC switch. When the entrance facility is used for backhauling in this manner, no traffic is exchanged between the ILEC and CLEC networks. App. 1.

Both the ILEC and CLEC involved in the lease of the entrance facility know whether the CLEC is using the entrance facility for interconnection or backhaul purposes, a fact that was not at issue either in this case or in *Pacific Bell*. *See Pacific Bell*, 621 F.3d at 842 n.8 (ILECs are "capable of screening out calls

that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call."); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 684 (8th Cir. 2008), Pet. App. 79a, *aff'g* 461 F. Supp. 2d 1055, 1072 (E.D. Mo. 2006) (the Missouri commission (and the district court) did not err in finding that "the entrance facilities requested by the CLECs would be used solely for interconnection purposes"); *Illinois Bell*, 526 F.3d at 1071-72, Pet. App. 84a ("The [Illinois] state commission tells us that ILECs can detect and block any attempted use of an entrance facility for backhauling. (Every carrier, ILEC or CLEC, must be able to determine the traffic's destination in order to route it accurately.)").

The Circuit Courts' Understanding of Backhaul. The Seventh, Eighth, and Ninth Circuits recognized that backhaul includes the movement of calls between a CLEC's switch and a CLEC customer located in an ILEC's service territory. *See Pacific Bell*, 621 F.3d at 842 (diagram), *amending Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 597 F.3d 958, 964 (9th Cir. 2010), Pet. App. 53a (identical diagram); *Southwestern Bell*, 530 F.3d at 681, Pet. App. 72a-73a; *Illinois Bell*, 526 F.3d at 1071, Pet. App. 82a-83a. Although the courts explained backhaul using the narrower example of two CLEC customers calling one another, the courts' use of the term backhaul is still accurate and correctly highlights the distinction between backhaul and interconnection, contrary to

AT&T Michigan's assertion otherwise. *See* Br. for Resp't 25 n.28. Regardless of what company serves the customer who ultimately receives the backhauled call, the CLEC nonetheless is using the entrance facility to move traffic to and from its own customer located within the ILEC's service area to a customer *other than the ILEC's customer*. Thus, no matter who is on the other end of the line, the CLEC is using the ILEC's network not to interconnect, but to serve its own customer.

In addition, the diagram in the Ninth Circuit's decision – albeit a simplified version of the diagrams the CPUC and AT&T California submitted – accurately depicts what an entrance facility is and its two different functions. *See Pacific Bell*, 621 F.3d at 842; *Pacific Bell*, 597 F.3d at 964, Pet. App. 53a. AT&T Michigan apparently believes the diagram places the entrance facility in, rather than connected to, the ILEC's switching facility (*i.e.*, the tandem office). Br. for Resp't 2 n.3. However, it is evident from the text of the decision that the Ninth Circuit understood how an entrance facility works. The court correctly described an entrance facility as a "high capacity wire that links telephone networks" and explained how the same entrance facility can be used for both interconnection and backhaul. *Pacific Bell*, 621 F.3d at 842.

The Telecommunications Act of 1996 and the Implementing Orders. Congress addressed interconnection in the Act. 47 U.S.C. §§ 201 *et seq.* (2011). The Act was designed to foster rapid development of competition in local telecommunications

services by requiring ILECs, such as AT&T Michigan and AT&T California, to share their networks with competitors seeking entry into the traditionally monopolistic local service market.

Pursuant to section 251, ILECs must provide interconnection for the CLECs' facilities and equipment "at any technically feasible point within the [ILEC's] network." *Id.* § 251(c)(2). Separate and distinct from the interconnection obligation, ILECs also must provide CLECs with access to the ILECs' "unbundled network elements" (UNEs), *e.g.*, loops, switches, and transport facilities. *Id.* § 251(c)(3). To determine what network elements ILECs must make available under section 251(c)(3), the Federal Communications Commission (FCC) must consider whether the failure to provide access to the network elements would "impair" the CLEC's ability to provide telecommunications service. *Id.* § 251(d)(2). The rates ILECs may charge for section 251(c)(2) interconnection and section 251(c)(3) access to unbundled network elements must be based on the ILECs' cost. *Id.* § 252(d)(1). The FCC implemented these provisions of the Act in the 1996 *Local Competition Order* (*LCO*),[5] the 2003 *Triennial Review Order* (*TRO*),[6]

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[5] First Report & Order, *Implementation of Local Competition Provisions in Telecomms. Act of 1996*, 11 FCC Rcd 15499 (1996) (subsequent history omitted).

[6] Report & Order & Order on Remand & Further Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 18 FCC Rcd 16978 (2003) (subsequent history omitted).

and the 2005 *Triennial Review Remand Order* (*TRRO*).[7]

The Ninth Circuit *Pacific Bell* Decision. In 2006, the CPUC issued a decision ruling that CLECs are entitled to lease ILEC entrance facilities used for interconnection at cost-based rates pursuant to section 251(c)(2). AT&T California filed an action in the Northern District of California, appealing the CPUC's decision. In 2008, the district court ruled in the CPUC's favor. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, No. 07-1797, 2008 WL 501390, at *6-7 (N.D. Cal. Feb. 21, 2008). The Ninth Circuit affirmed the district court's decision in March 2010. *Pacific Bell*, 597 F.3d at 965-69, Pet. App. 56a-63a.

Just days before the Ninth Circuit issued its decision, the Sixth Circuit issued its split decision ruling the opposite way. Pet. App. 1a. In September 2010, the Ninth Circuit denied rehearing and issued an amended decision "reject[ing] the reasoning advanced by AT&T and the Sixth Circuit in its recent 2-1 decision." *Pacific Bell*, 621 F.3d at 844. On December 10, 2010, the Court granted certiorari in *Isiogu* and *Talk America*. AT&T California filed a petition for a writ of certiorari in *Pacific Bell* on December 23, asking the Court to hold the petition pending the Court's decision in *Isiogu* and *Talk America*. *See* Pet. for Writ of Cert. at 7, *Pacific Bell*, No. 10-838 (U.S. Dec. 23, 2010). By letter to the Clerk

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[7] *See supra* note 2.

of the Court dated January 10, 2011, the CPUC waived its brief in opposition to the *Pacific Bell* petition in light of the Court's grant of certiorari in these consolidated cases.

SUMMARY OF ARGUMENT

Pursuant to the most reasonable interpretation of the Act, (1) a CLEC is entitled to access to an ILEC entrance facility to interconnect the CLEC's network with the ILEC's network so the customers of each can talk to one another, and (2) the appropriate rate for this use of the entrance facility is based on the ILEC's cost. Section 251(c)(2) requires ILECs to provide CLECs with interconnection at cost-based rates, and an entrance facility is just such a piece of equipment used to achieve interconnection. The Seventh, Eighth, and Ninth Circuits all agree.

The FCC's implementing orders support this interpretation. The FCC interpreted the interconnection obligation broadly in the *LCO* to include different methods and locations for interconnection at the CLEC's choosing. In the subsequent *TRO*, the FCC clarified that the interconnection duty includes the provision of entrance facilities. Ultimately, in the *TRRO*, the FCC found CLECs unimpaired without access to entrance facilities and declassified entrance facilities used for backhaul as an unbundled network element under section 251(c)(3). In paragraph

140, however, the FCC explicitly reaffirmed that its unbundling decision did not affect the section 251(c)(2) requirement (interpreted by the FCC in the *LCO* and the *TRO*) that ILECs provide interconnection facilities at cost-based rates. The issue in this case is whether an "entrance facility" used for interconnection is an "interconnection facility." Based on logic, common sense, and the FCC's interpretation of section 251(c)(2), the answer must be yes.

The Sixth Circuit's split decision to the contrary conflicts with the language of and pro-competitive policy behind section 251(c)(2) of the Act and the FCC's orders, all of which provide CLECs with a broad right to interconnect their networks with those of the ILECs for the mutual exchange of traffic and require ILECs to provide that interconnection. The CPUC urges the Court to reverse the Sixth Circuit's decision.

ARGUMENT

THE COURT SHOULD HOLD THAT ILECS MUST LEASE ENTRANCE FACILITIES TO CLECS AT COST-BASED RATES WHEN CLECS USE SUCH ENTRANCE FACILITIES FOR INTERCONNECTION PURSUANT TO SECTION 251(C)(2) OF THE ACT

A. Section 251(c)(2) Requires ILECs to Provide the Actual Facilities for Interconnection, Including Entrance Facilities

Pursuant to section 251(c)(2) of the Act, an ILEC must provide, "for" a CLEC's "facilities and equipment," interconnection with the ILEC's network "at any technically feasible point within the [ILEC's] network." 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305 (2011). The most rational interpretation of this section is that the interconnection the ILEC must provide includes the actual equipment to enable interconnection, one piece of which is an entrance facility.

First, an ILEC's entrance facility provides the required interconnection "for" the CLEC's "facilities and equipment," *i.e.*, the CLEC's network. Congress did not define the term "interconnection" or use the terms "interconnection facility" or "entrance facility." Yet the Act also does not specify what ILECs must do to satisfy the interconnection obligation, much less establish that the interconnection duty affirmatively excludes the provision of the actual facilities to achieve interconnection, such as an entrance facility.

which all parties agree does indeed provide that interconnection function. Because an entrance facility connects on one end with a piece of CLEC network equipment (a switch) and on the other end with a piece of ILEC network equipment (another switch), the ILEC's entrance facility provides interconnection "for" the CLEC's equipment.

An ILEC's entrance facility also provides interconnection "at any technically feasible point within the [ILEC's] network." The point at which the entrance facility connects with the ILEC's switch is such a point. As the Seventh Circuit stated, "[a]n entrance facility, designed for the very purpose of linking two carriers' networks, meets the requirement of feasibility, so a CLEC is entitled to hand off traffic to an ILEC at any entrance facility." *Illinois Bell*, 526 F.3d at 1072, Pet. App. 84a.

Somewhat confusingly, AT&T Michigan concedes that an entrance facility is a "common means of achieving interconnection" but also contends that an entrance facility is "not . . . part of 'interconnection'" but part of the ILEC's network itself, such that a CLEC cannot lease part of a network to interconnect with that network. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 32, *supra* at 3. AT&T Michigan argues that, because one end of an ILEC-provided entrance facility connects with the CLEC's switch, interconnection occurs at a point on the CLEC's, not the ILEC's, network. *See* Br. for Resp't 21. Yet AT&T Michigan cannot avoid the fact that an entrance facility does provide the *physical link* between CLEC and ILEC

switches that allows the customers of each network to talk to one another, and that physical link is interconnection. Indeed, whatever the interconnection method, interconnection by definition is always going to occur, on one end, at a point on the ILEC's network. It is just a question of where and how that physical link occurs.

Moreover, interpreting section 251(c)(2) to include the provision of entrance facilities used for interconnection is consistent with the policy behind the Act. Designed to promote competition in local telecommunications services by requiring ILECs to share their networks with new market entrants, the Act "ensures that incumbents do not charge competition-dampening rates for interconnection, a not insignificant risk given that entrants need interconnection more than incumbents do." *Michigan Bell*, 597 F.3d at 387-88 (Sutton, J., dissenting), Pet. App. 35a. Reading the Act to exclude the provision of equipment CLECs need to achieve interconnection (such as entrance facilities) would be contrary to the Act's pro-competitive purpose. Rather, section 251(c)(2) should be read (1) to require ILECs to provide the physical link between networks, a physical link that can occur in different ways and at different locations – "at any technically feasible point" the CLEC chooses – and (2) to include entrance facilities as such physical links.

B. Pursuant to the FCC's Implementation of Section 251(c)(2), Entrance Facilities Are a Form of Interconnection ILECs Must Provide

The FCC's orders implementing the Act support this interpretation of section 251(c)(2) as requiring ILECs to provide the actual equipment – *e.g.*, an entrance facility – to interconnect two networks. In the *LCO*, the FCC interpreted the right to interconnection broadly. In the *TRO*, it distinguished between the two uses of entrance facilities under section 251(c)(2) (the interconnection use) and section 251(c)(3) (the backhaul use). Finally, in the *TRRO*, the FCC re-confirmed the CLECs' right to obtain interconnection facilities – which include entrance facilities used for interconnection – at cost-based rates.

1. The *LCO* Set Forth the Breadth of Section 251(c)(2) Interconnection Choices

In the *LCO* – the first and primary order implementing the Act's interconnection requirements – the FCC emphasized the scope and breadth of the ILECs' section 251(c)(2) interconnection obligation, as distinct from the section 251(c)(3) unbundling obligation. Although the FCC did not explicitly use the term "entrance facilities," it broadly interpreted the interconnection duty to require ILECs to provide CLECs a wide range of physical facilities CLECs can use to interconnect their networks with the ILECs'

networks. An entrance facility used for interconnection is just such a physical facility.

a. The FCC's Definition of Interconnection

The FCC began by defining interconnection as the "physical linking of two networks for the mutual exchange of traffic." *LCO* ¶ 176; 47 C.F.R § 51.5. The Circuit Courts have interpreted that "linking" to mean an actual facility or piece of equipment that physically joins two networks. *See Southwestern Bell*, 530 F.3d at 684, Pet. App. 79a, *citing AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (looking to the District of Columbia Circuit's interpretation of interconnection as referring to "facilities and equipment"); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997) (noting the Act does not define interconnection and upholding the FCC's definition of interconnection as a "physical link"). *See also Southwestern Bell*, 461 F. Supp. 2d at 1072 (relying on the FCC's definition of interconnection as a physical link using facilities and equipment and rejecting argument that ILECs do not need to lease the interconnection facilities themselves to CLECs).

Then, in further articulating the practicalities of interconnection, the FCC included the actual, physical facilities used for interconnection within the ILEC's obligation and required ILECs to affirmatively "design" them. In the regulation entitled

"Interconnection," the FCC used the term "interconnection facilities" to refer to the facilities ILECs must provide to CLECs to enable interconnection. The regulation requires LECs to "design interconnection facilities" that are at least of the same quality as that which the ILEC provides itself, a subsidiary, or an affiliate. 47 C.F.R. § 51.305(a)(3). Thus, the FCC's initial analysis of interconnection included actual "interconnection facilities."

According to AT&T Michigan, however, the provision of entrance facilities to allow different carriers' customers to talk to one another involves the "transport" of CLEC traffic, such that the entrance facility does not fall under the FCC's definition of interconnection. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 32-33, *supra* at 3. However, as the FCC explained, defining interconnection as a physical link between networks did not remove the ILEC's duty to route and terminate the traffic that moves through the interconnection point. *See LCO* ¶ 176 ("We also reject [the] argument that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic."). The Ninth Circuit similarly rejected this argument and reasoned that, if the interconnection obligation "did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC, but refuse to carry calls to the incumbent LEC's terminal customers, thus effectively locking the

competitive LEC out of the market." *Pacific Bell*, 621 F.3d at 846 n.16.

b. The FCC's Definition of "Technically Feasible" Points of Interconnection

Consistent with its broad definition of interconnection – including ILECs' provision of "interconnection facilities" in 47 C.F.R. § 51.305(a)(3) – the FCC similarly took a broad view of what constitutes a "technically feasible point" of interconnection. The FCC repeatedly emphasized that it is the CLEC's choice regarding where and how interconnection occurs. Once again, entrance facilities used for interconnection fit within this broad interpretation of what is technically feasible.

In exploring the concept of technical feasibility, the FCC explained that section 251(c)(2) "lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic." *LCO* ¶ 209. The FCC concluded that a CLEC "may *choose any* method of technically feasible interconnection . . . at a particular point." *Id.* ¶ 549 (emphasis added). *See also* 47 C.F.R. § 51.321(a) (ILECs are required to provide "any technically feasible method of obtaining interconnection"); *LCO* ¶ 202 (the term feasible "encompass[es] more than what is merely 'practical' or similar to what is ordinarily done").

The FCC also refused to limit interconnection to any particular methods. *See id.* ¶ 549 (section 251(c)(2) "does not limit [the interconnection] duty to a specific method of interconnection"). Instead, the FCC concluded that it "should identify a minimum list of technically feasible points of interconnection" and gave examples of types. *Id.* ¶ 209. *See also id.* ¶ 550 (confining interconnection to just collocation – the only method section 251 explicitly mentions – would "dramatically" narrow the requirement that interconnection be made available at any technically feasible point). With that expansive view of interconnection in mind, "other methods of technically feasible interconnection . . . , such as meet point arrangements, in addition to virtual and physical collocation, must be available." *Id.* ¶ 553. *See also* 47 C.F.R. § 51.321(b) (technically feasible interconnection methods "include, but are not limited to" collocation at ILEC's premises and meet point interconnection arrangements). In this way, the FCC laid out an interconnection duty that "encompasses more than providing competitors with an outlet to plug into." *Michigan Bell*, 597 F.3d at 389 (Sutton, J., dissenting), Pet. App. 38a.

Finally, and perhaps most significantly, the FCC concluded that the ILECs' interconnection duty includes the modification and/or build-out of the ILECs' network facilities to accommodate interconnection. *LCO* ¶ 198. *See also* 47 C.F.R. § 51.5 (defining "technically feasible" and noting that "[t]he fact that an incumbent ILEC must modify its facilities or

equipment to respond to [a CLEC's request for interconnection] does not determine whether satisfying such request is technically feasible"); *LCO* ¶ 202 (an ILEC "must accept the novel use of, and modification to, its network facilities to accommodate the interconnector"), ¶ 553 ("although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by section[ ] 251(c)(2)").

This modification build-out obligation does not unfairly burden the ILECs, as they can recoup the cost of accommodating the CLEC's choice of interconnection through rates, pursuant to section 252(d)(1). *See id.* ¶ 199 (a CLEC "that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit"), ¶ 200 ("to the extent incumbent LECs incur costs to provide interconnection . . . , incumbent LECs may recover such costs from requesting carriers"), ¶ 209 ("because [CLECs] must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect"). *See also US W. Comme'ns, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 982-83 (D. Minn. 1999) (upholding state commission's order requiring an ILEC to build new facilities necessary for a new entrant to connect to the ILEC's network "at any technically feasible point of the CLEC's

choosing" and noting parties' agreement that the new entrant would pay the cost).

Entrance facilities used for interconnection fall within this broad interconnection framework the FCC set out in the *LCO*. An entrance facility – whether existing or new – is a physical link between networks. As such, it meets the FCC's definition of interconnection, and ILECs must provide it to CLECs at cost-based rates. As Judge Sutton stated, "[e]ntrance facilities come within the ordinary meaning of a 'technically feasible method of obtaining interconnection.'" *See Michigan Bell*, 597 F.3d at 388 (Sutton, J., dissenting), Pet. App. 36a.

2. The *TRO* Confirmed That the Right to Interconnection Includes the ILECs' Provision of Entrance Facilities

In the *TRO*, the FCC concluded that ILECs no longer had to provide entrance facilities used for backhaul on an unbundled basis under section 251(c)(3), but did not touch the ILECs' duty to provide entrance facilities used for interconnection under section 251(c)(2). In paragraphs 365 and 366, the FCC carefully distinguished between the two different uses for such transmission facilities and preserved the requirement that ILECs make available facilities for interconnection. An entrance facility is one such interconnection facility.

As set forth above, the FCC defined the CLECs' right to interconnection in broad terms in the *LCO*.

In the *TRO*, the FCC took that broad duty and articulated a specific interconnection duty with regard to entrance facilities. *See Pacific Bell*, 621 F.3d at 846 ("Though the LCO did not expressly state that entrance facilities were one of the 'network elements' incumbent LECs were required to make available under 47 U.S.C. § 251(c)(2), the later [TRO] expressly interpreted the LCO to impose this obligation."). In paragraph 365, the FCC made the explicit finding that CLECs use "transmission connections" between ILEC and CLEC networks – *i.e.*, entrance facilities – for both interconnection and backhaul:

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. *Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for Section 251(c)(2) interconnection*, we find that the Act does not require incumbent LECs to unbundle transmission

> facilities connecting incumbent LEC networks to competitive LECs *for the purpose of backhauling traffic*.

TRO ¶ 365 (emphasis added; footnote omitted). Thus, the FCC removed the section 251(c)(3) unbundling requirement for entrance facilities (*i.e.*, transmission links) used for *backhaul*.

Then, in paragraph 366, the FCC stated that it was not changing the CLEC's statutory right to interconnect using those same transmission facilities:

> In reaching this determination [that the "dedicated transport" unbundled network element includes only those transmission facilities within the ILEC's network] we note that, *to the extent that requesting carriers need facilities in order to "interconnect[] with the incumbent LEC's network," section 251(c)(2) of the Act expressly provides for this* and we do not alter the Commission's interpretation of this obligation.

Id. ¶ 366 (emphasis added) (footnotes omitted).

These paragraphs of the *TRO* are still good law today, contrary to what the Sixth Circuit found or what AT&T Michigan asserts. *See Michigan Bell*, 597 F.3d at 383 n.13, Pet. App. 25a; Br. for Resp't 25 n.28. In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), the District of Columbia Circuit remanded the *TRO*'s section 251(c)(3) unbundling issue of whether entrance facilities used for backhaul are a network element and whether CLECs

are impaired without access to that network element. *USTA II*, 359 F.3d at 585-86. The court focused on unbundling and did not address the FCC's discussion of the two uses for entrance facilities and/or the FCC's explicit preservation of the CLECs' right to obtain entrance facilities used for section 251(c)(2) interconnection. *See TRRO* ¶¶ 136-37.

Thus, as the Ninth Circuit aptly explained:

> [T]his portion of the TRO [¶¶ 365-66] was not vacated in *USTA II*. *USTA II* vacated only the TRO's conclusion that entrance facilities are categorically excluded from the definition of "network elements" under § 251(c)(3). The court did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at TELRIC [total element long-run incremental cost, *i.e.*, cost-based] rates.

Pacific Bell, 621 F.3d at 846 n.15 (citations omitted). *See also id.* at 841 (the "relevant parts" of the *LCO* and *TRO* "were not invalidated by courts"). In the subsequent *TRRO*, the FCC itself cited to Paragraph 366 of the *TRO*. *See infra* § B.3.b. Moreover, from a practical, commonsense perspective, the factual distinction between backhaul and interconnection did not suddenly disappear following remand of the *TRO*. CLECs use entrance facilities in these two different ways, as the parties all agree here.

3. The *TRRO* Preserved the Right to Entrance Facilities Used for Interconnection

In the *TRRO* – the FCC's fourth attempt to promulgate valid unbundling regulations under section 251(c)(3) – the FCC continued to recognize the two different uses of entrance facilities and reaffirmed the CLECs' right to obtain ILEC interconnection facilities – which include entrance facilities used for interconnection – at cost-based rates pursuant to section 251(c)(2). The FCC's finding that CLECs are not impaired under section 251(c)(3) without access to entrance facilities for backhaul had no effect on the CLECs' separate statutory right to lease entrance facilities used for section 251(c)(2) interconnection.

a. The Entrance Facility Regulation Promulgated in the *TRRO* Only Addresses Entrance Facilities Used Pursuant to Section 251(c)(3)

Like the *TRO*, the *TRRO* is a section 251(c)(3) unbundling order. *See TRRO* ¶¶ 1-4. In the section entitled "Entrance Facilities," the FCC revisited the issue of whether ILECs must offer entrance facilities on an unbundled basis and decided the answer was no: to the extent a CLEC wants to use an entrance facility to move traffic to and from its customers located in the ILEC's service territory, it should get its own entrance facility. *Id.* ¶¶ 136-141. *See also id.* ¶ 138 n.389 (noting that a particular CLEC "utilizes

third-party providers for backhaul from [the CLEC's] collocation arrangements to [the CLEC's] switches"), ¶ 141 n.396 (referring to "dedicated facilities used for backhaul between networks").

Accordingly, the FCC's regulation effectuating that finding, 47 C.F.R. § 51.319 (entitled "Specific unbundling requirements"), is a section 251(c)(3) unbundling regulation. It provides that entrance facilities a CLEC uses for backhaul are delisted as unbundled network elements – *i.e.*, ILECs are no longer required to provide entrance facilities used for backhaul at cost-based rates. 47 C.F.R. § 51.319(e)(2)(i) ("Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier [*i.e.*, CLEC] with *unbundled access* to dedicated transport that does not connect a pair of incumbent LEC wire centers.") (emphasis added).

Indeed, 47 C.F.R. § 51.319(e)(2)(i) specifically refers to access to entrance facilities on an *unbundled* basis, therefore implicating section 251(c)(3), not section 251(c)(2). Reading this regulation to remove the ILECs' obligation to provide *all* entrance facilities (including those used for interconnection) ignores that the FCC set forth the section 251(c)(2) obligation in another regulation entitled "Interconnection," 47 C.F.R. § 51.305. *See supra* § B.1.a.; *Michigan Bell*, 597 F.3d at 390 (Sutton, J., dissenting), Pet. App. 39a-40a (reading the unbundling regulation to eradicate the interconnection obligation "turns the phrase 'with unbundled access' into a useless appendage"). In

arguing that the FCC determined that CLECs also do not need cost-priced entrance facilities for interconnection (*see* Br. for Resp't 25-26), AT&T Michigan misreads the *TRRO*: the FCC only addressed entrance facilities used for backhaul on an unbundled basis under section 251(c)(3).

b. Paragraph 140 Clarified That the Section 251(c)(2) Interconnection Duty Regarding Entrance Facilities is Unchanged

Immediately following its discussion of removing the section 251(c)(3) unbundling requirement for entrance facilities, the FCC clarified that its decision to do so had no effect on the ILEC's separate section 251(c)(2) duty to provide interconnection. In paragraph 140, the FCC preserved the CLECs' right to use an entrance facility (a type of interconnection facility) at cost-based rates:

> We note in addition that our finding of non-impairment with respect to entrance facilities *does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2)* for the transmission and routing of telephone exchange service and exchange access service. [n.394 *Triennial Review Order*, 18 FCC Rcd at 17204, para. 366.] Thus, competitive LECs *will have access to these facilities at cost-based rates to the extent that they require*

> *them to interconnect with the incumbent LEC's network.*

TRRO ¶ 140 (emphasis added).[5]

Although the FCC did not define the term interconnection facilities, it logically includes entrance facilities used for interconnection. First, as discussed above, paragraph 140 falls within a section of the *TRRO* entitled "Entrance Facilities," in which the FCC addressed removal of the section 251(c)(3) unbundling requirement for entrance facilities. *See Pacific Bell*, 621 F.3d at 845 ("although the FCC did not use the term 'entrance facilities' in Paragraph 140, the paragraph appears in a section of the TRRO entitled 'Entrance Facilities,' which solely discusses the effect of the FCC's finding as to entrance facilities").

Second, if the same physical facility that the FCC decided was no longer a section 251(c)(3) unbundled network element could not also act as a section 251(c)(2) "interconnection facility," the FCC would have had no reason to emphasize in its discussion of entrance facility unbundling that CLECs also have a right to interconnection facilities under section 251(c)(2). *See Michigan Bell*, 597 F.3d at 390 (Sutton,

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[5] A CLEC "requires" an entrance facility for interconnection when it does not have one of its own. *See Southwestern Bell*, 530 F.3d at 684, Pet. App. 78a-79a ("If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC.")

J., dissenting), Pet. App. 40a-41a ("[W]hy would [the FCC] underscore the incumbents' continuing obligation to provide interconnection facilities? These points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities.") (citations omitted). Similarly, AT&T Michigan's assertion that paragraph 140 only assured CLECs that ILECs would still provide "patch cords" that link two wires together for interconnection is not convincing. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 39 n.23, *supra* at 3. If these patch cords are merely "ancillary equipment" (*id.* at 40), the FCC would not have had to be so careful in its discussion of entrance facility unbundling to preserve the CLEC's right to use them for interconnection.

Moreover, this interpretation is consistent with the FCC's discussion of interconnection in the LCO and TRO, as well as the Act itself. Indeed, in the footnote in paragraph 140, the FCC itself *cited to paragraph 366* of the *TRO* in support of its statement that CLECs have the right to obtain interconnection facilities. *TRRO* ¶ 140 n.394. The FCC had no need to repeat what it stated in the *TRO* regarding the backhaul/interconnection distinction because those parts of the *TRO* were not vacated. *See supra* § B.2.

c. The Continued Right to Entrance Facilities for Interconnection is Consistent with the FCC's Removal of the Unbundling Requirement

Requiring ILECs to provide entrance facilities for section 251(c)(2) interconnection also is consistent with and in no way undermines the FCC's decision to remove the section 251(c)(3) unbundling obligation from entrance facilities. The Seventh Circuit phrased the ILEC position and the response as follows:

> What's the point of specifying that CLECs cannot demand access to entrance facilities as unbundled network elements . . . if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that CLECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then CLECs could use entrance facilities for both interconnection and backhauling. Under the state's order, CLECs use entrance facilities exclusively for interconnection, just as the FCC said in ¶ 140.

Illinois Bell, 526 F.3d at 1071, Pet. App. 83a-84a.

Similarly, the Ninth Circuit concluded that, "[i]n light of the different economic considerations associated with the use of entrance facilities for interconnection, on the one hand, and for backhaul, on the other, the FCC could reasonably conclude that

different regulations were appropriate." *Pacific Bell*, 621 F.3d at 847. The court further reasoned:

> Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits – both the originator and the recipient of the call are competitive LEC customers. But when the competitive LEC uses the entrance facility for interconnection, both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa.

Id.

Because sections 251(c)(2) and (c)(3) impose separate ILEC obligations, the FCC can change one obligation without changing (or "negating") the other. Conversely, retaining the interconnection requirement does not "re-impose" the "repealed" requirement. The section 251(d)(2) impairment analysis only applies under section 251(c)(3), so the FCC's finding that CLECs have competitive alternatives to entrance facilities used as unbundled network elements is irrelevant to the CLEC's right to the same equipment for interconnection under section 251(c)(2). Thus, the FCC's removal of the unbundling requirement did not change the CLECs' statutory right to obtain ILEC interconnection facilities, including entrance facilities used for interconnection. By maintaining the ILECs' obligation to offer their entrance facilities to CLECs for interconnection, the FCC acted consistently with the Act's purpose of promoting competition in local

telephone service, as well as with its own prior orders, the *LCO* and *TRO*.

C. The Sixth Circuit Erred in Holding That an ILEC's Only Duty is to Allow a CLEC to "Plug in" its Own Equipment into the ILEC's Network

According to the majority in the Sixth Circuit, paragraph 140 of the *TRRO* merely provides that, if a CLEC builds its own entrance facility, the ILEC must let the CLEC hook that entrance facility up to the ILEC's network by providing an "interconnection facility" – nothing more than a place for the CLEC to "plug in" – at regulated rates. Yet the panel majority made a number of analytical errors, the most significant of which the CPUC discusses below, and misinterpreted the statute and the FCC's orders contrary to both their plain meaning and the Act's pro-competitive purpose.

1. The Sixth Circuit Mistakenly Concluded That an Entrance Facility Used for Interconnection Is Not a Type of Interconnection Facility

The panel majority concluded that the FCC used the terms "entrance facilities" and "interconnection facilities" to refer to different pieces of equipment. In doing so, the panel majority developed its own analogy of public park-goers in need of electricity plugging their "big orange extension cords" (*i.e.*,

entrance facilities) into a homeowner's "outlet" (*i.e.*, the "interconnection facility"). *Michigan Bell*, 597 F.3d at 374 n.4, 379-82, Pet. App. 6a, 18a-23a. In their view, because entrance facilities "do not connect the CLEC with the ILEC network directly" (and instead connect the CLEC with the ILEC's "interconnection facility"), entrance facilities are not a technically feasible means of interconnection. *Id.* at 382 n.12, Pet. App. 24a. The panel majority is mistaken.

The FCC is clear – and the parties agree – that an entrance facility is a way to interconnect ILEC and CLEC networks. The FCC defined entrance facilities simply as the transmission links between ILEC and CLEC networks, without any limitation on the length of that link. The fact that the FCC did not include an "interconnection facility" definition in or around paragraph 140 of the *TRRO* is not a reason to ignore the FCC's consistently broad interpretation of interconnection in its prior orders, including its use of the term "interconnection facility" itself in 47 C.F.R. § 51.305(a)(3). Moreover, had the FCC not used the term before (which it had), the use of a term without an accompanying explicit definition does not foreclose a reasonable interpretation of that term's plain language: "interconnection" plus "facility" is simply a piece of equipment used to physically link networks, and an entrance facility is just such a piece of equipment.

Also, entrance facilities do indeed connect ILEC and CLEC network equipment; there is no intermediary, additional "interconnection facility." *See* Talk

America's Pet. for Writ of Cert. 26 (in "practical reality," the entrance facility provides the "bridge" between CLEC and ILEC networks); Br. of Appellant AT&T Cal. at 4 fig.2, *supra* at 3 (diagram showing only an "entrance facility" connecting CLEC switch with ILEC tandem office). Thus, by deciding that an entrance facility is somehow not a type of interconnection facility and creating an erroneous "big orange extension cord" analogy, the Sixth Circuit improperly developed its own definition of what an entrance facility is and then improperly substituted its definition in place of both the FCC's interpretation of interconnection and the facts the parties presented.

2. The FCC's Elimination of the Unbundling Requirement for Entrance Facilities Did Not Eliminate the Separate Interconnection Requirement, Contrary to the Sixth Circuit's Determination

The panel majority also improperly read the FCC's regulation eliminating the unbundling requirement as removing the ILEC's duty to provide all entrance facilities, regardless of how the CLEC uses them. *Michigan Bell*, 597 F.3d at 377, 382 n.12, 386, Pet. App. 12a-13a, 24a, 31a. This interpretation collapses the interconnection and unbundling obligations in direct conflict with the statutory language and the FCC's orders.

The ILECs' section 251(c)(2) interconnection duty and section 251(c)(3) unbundling duty are separate

and distinct obligations. The analysis by which a state commission determines whether a CLEC is impaired without access to a particular network element applies only to the unbundling duty. 47 U.S.C. § 251(d)(2) ("[i]n determining what network elements should be made available *for purposes of subsection (c)(3)*," the FCC must consider whether the ILEC's failure to provide access to a network element would impair the ability of the CLEC to provide the services it seeks to offer) (emphasis added). *See Michigan Bell*, 597 F.3d at 389 (Sutton, J., dissenting), Pet. App. 38a ("an impairment analysis has no role to play under § 251(c)(2), and the FCC has never, to my knowledge, considered impairment when analyzing an [ILEC's] interconnection obligations") (citations omitted); *Illinois Bell*, 526 F.3d at 1072, Pet. App. 84a (the rate an ILEC can charge for entrance facilities used for interconnection "is not related to the scope of an ILEC's obligations under § 251(c)(3) to furnish unbundled network elements").

When the FCC decided that CLECs were not impaired without access to entrance facilities under section 251(c)(3), it issued 47 C.F.R. § 51.319(e)(2)(i), a regulation which, by its terms, relates only to section 251(c)(3) unbundling and removes the ILEC's obligation to provide entrance facilities on an unbundled basis. This regulation has no effect on ILECs' separate and distinct duty to provide entrance facilities used for interconnection under section 251(c)(2). Contrary to the panel majority's reasoning, the FCC did indeed explicitly apply two different rules (under

sections 251(c)(2) and 251(c)(3)) to the "same exact wire" based on the functions of that wire, and it was reasonable for the FCC to do so.

3. The Sixth Circuit Disregarded Both the Fact That CLECs Use the Same Entrance Facility in Two Different Ways and the FCC's Regulatory Distinction Between These Uses

In addition, the panel majority erroneously rejected the distinction between the backhaul and interconnection uses of entrance facilities. They reasoned that the *TRRO* did not discuss the backhaul versus interconnection distinction and that the *TRO*'s discussion of backhaul and interconnection is no longer valid. *Michigan Bell*, 597 F.3d at 381-82, 383 n.13, 384-86, Pet. App. 21a-23a, 25a, 27a-31a. However, there is no dispute here (or in *Pacific Bell*) – and the Sixth Circuit was wrong to create one where one did not exist – that a CLEC can use an entrance facility for either interconnection or backhaul. The FCC already had distinguished between these two different uses in paragraphs 365 and 366 of the *TRO*, and that discussion still stands. There was no reason for the FCC to repeat those findings in the *TRRO*.

4. The Act Should be Interpreted to Expand the CLECs' Interconnection Choices, Not Limit Them

In ultimately concluding that all an ILEC must do under section 251(c)(2) is make a "plug-in" location available to the CLEC, and not provide any actual equipment to facilitate that connection, the Sixth Circuit improperly limited that CLEC's interconnection choices, in direct conflict with both the Act and the FCC's orders. No longer is a CLEC able to interconnect via "any technically feasible" method under the statute; rather, the ILEC is given the power to choose whether a piece of equipment is an entrance facility or an interconnection facility. *See id.* at 390-91 (Sutton, J., dissenting), Pet. App. 41a. By concluding that an entrance facility becomes an interconnection facility only when the ILEC says the CLEC must use it, the majority granted ILECs control over choosing the point of interconnection where no such power should exist, ignored the ILEC's duty to provide interconnection at any technically feasible point the CLEC picks, and interpreted section 251(c)(2) in a way that directly conflicts with the Act's purpose of promoting competition.

CONCLUSION

For the reasons stated above, the CPUC urges the Court to reverse the Sixth Circuit's decision.

Respectfully submitted,

February 3, 2011

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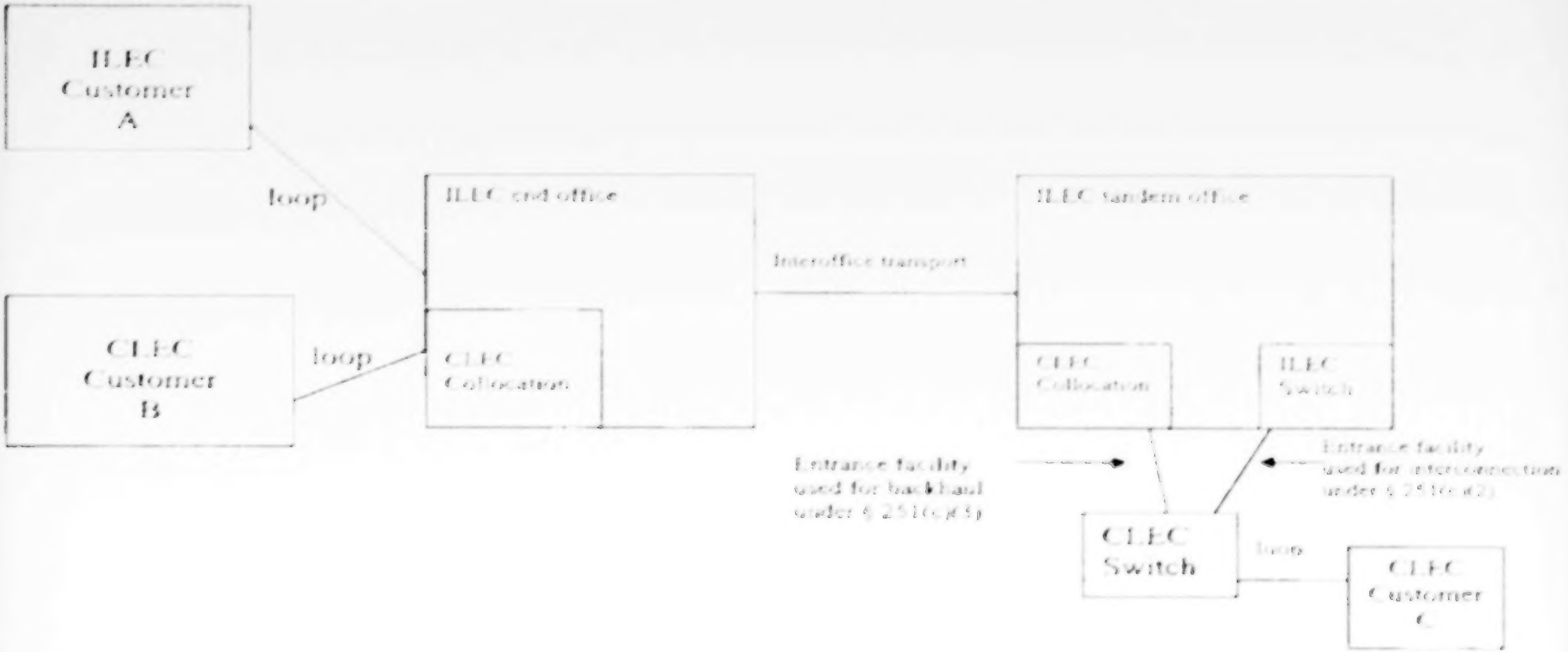
App. 1

Diagram 1



AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
MAR 8 - 2011
OFFICE OF THE CLERK

13

Nos. 10-313 and 10-329

In the
Supreme Court of the United States

TALK AMERICA, INCORPORATED, PETITIONER
v.
MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN, RESPONDENT.

ORJIAKOR ISIOGU, ET AL., PETITIONERS
v.
MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR CENTURYLINK, QWEST COMMUNICATIONS INTERNATIONAL, AND WINDSTREAM CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici Qwest Communications International Inc ("Qwest"), CenturyLink, Inc. ("CenturyLink"), and Windstream Corporation ("Windstream") are, through their operating companies, among the nation's largest incumbent local exchange carriers ("ILECs") providing service in both urban and rural areas throughout the United States.

Qwest provides local exchange telecommunications, exchange access, information access, data and interexchange long distance services pursuant to tariffs and contracts within a 14-state incumbent local exchange region.

CenturyLink provides voice, broadband and video services to consumers and businesses in 33 states.

In 2010, Qwest Communications International Inc., the parent of Qwest, and CenturyTel, Inc. d/b/a CenturyLink, announced their intention to merge. Subject to remaining regulatory approvals, the merger is expected to close during the second quarter of 2011.

Windstream is one of the largest providers of telecommunications services, primarily in rural communities in the United States. It provides voice,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

broadband, and video services to customers in 29 states.

Amici are identically situated to respondent Michigan Bell Telephone Company ("AT&T"). Like AT&T, amici are subject to the interconnection duty in 47 U.S.C. § 251(c)(2). Some state commissions in the states in which amici operate have interpreted that section to require amici to provide entrance facilities to competitive local exchange carriers ("CLECs") at TELRIC rates. Other state commissions, however, have correctly rejected that interpretation,[2] as did the United States Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

Section 251 of the Telecommunications Act of 1996 ("the Act") imposes on incumbent local exchange carriers ("ILECs") the obligation to provide CLECs with "nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The FCC determines the unbundled network elements ("UNEs") ILECs are required to provide, and it can require unbundling of a network element only if it

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[2] See, e.g., Order Addressing Applications for Rehearing, Reargument, or Reconsideration, *Sprint Communications Company L.P.'s Petition for Arbitration with CenturyTel of Eagle, Inc. Pursuant to § 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 08B-121T, Decision No. C08-1218, 2008 WL 5158834 (Colo. Pub. Utils. Comm'n Nov. 20, 2008). But see Order, *Sprint Communications Company L.P. Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc.*, ARB 830, Order No. 08-486, 2008 WL 4493108 (Or. Pub. Utils. Comm'n Mar. 31, 2009).

finds that an ILEC's failure to provide access to the element "would impair the ability of the [competitor] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B).

The rates that apply to UNEs are set by state commissions applying the FCC's total element long-run incremental cost ("TELRIC") methodology. Under this pricing scheme, state commissions base rates on the hypothetical cost of a UNE, not on the cost the ILEC actually incurs to provide it. The statutory basis for TELRIC no longer exists when it becomes economically feasible for competitors to construct the facility in question or to obtain it from non-ILEC sources. At that point, requiring TELRIC prices for non-bottleneck facilities suppresses facilities-based competition, which is directly contrary to the ends the Act is designed to achieve.

The FCC's non-impairment finding for entrance facilities establishes that there is a competitive market for these facilities. Permitting petitioners to obtain entrance facilities at TELRIC rates in this circumstance would embrace a policy of long-term dependence on ILECs' facilities at below-market prices and contravene the Act's purposes. The judgment of the court of appeals should be affirmed.

ARGUMENT

A. Requiring Incumbents to Provide Non-Bottleneck Network Elements at TELRIC Rates Undermines the Objectives of the 1996 Act

1. The preamble to the Telecommunications Act of 1996 concisely describes the end and the means

Congress had in mind when it passed this landmark legislation. The Act is designed to:

> promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.[3]

The end is a competitive market in which service quality meets customer expectations and continuing investment in infrastructure leads to innovative services. Congress established competition as the means to these ends, particularly "facilities-based" competition for local telephone service. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) ("*USTA II*").

To facilitate the opening of local telecommunications markets, Section 251 imposes on ILECs the obligation to provide CLECs with "nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The FCC determines the UNEs ILECs are required to provide, and it can require unbundling of a network element only if it finds that an ILEC's failure to provide access to the element "would impair the ability of the [competitor] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B). This unbundling obligation was based on the determination that economies of scale in certain portions of the ILECs' networks created

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[3] Pub. L. No. 104-104, 110 Stat. 56 (preamble).

bottleneck facilities that could present insurmountable barriers to entry.[4]

The rates that apply to UNEs are set by state commissions applying the FCC's total element long-run incremental cost ("TELRIC") methodology. Under this pricing scheme, state commissions base rates on the "hypothetical cost" of a UNE, not on the cost the ILEC actually incurs to provide it.[5] The FCC has recognized that requiring ILECs to provide network elements under this hypothetical pricing construct "is one of the most intrusive forms of economic regulation."[6] And the Supreme Court has similarly commented that TELRIC gives CLECs access to UNEs at rates that are "just above the confiscatory level."[7]

Although TELRIC is meant to simulate the costs a carrier would incur to build a network in a competitive market, it does not in fact do so.

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[4] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 232 (1996) ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[5] *Local Competition Order* ¶ 672.

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶141 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part by USTA II*, 359 F.3d 554.

[7] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

Instead, it relies on hypothetical assumptions that understate the true costs of providing a network element, leading to prices that are consistently below those that would actually prevail in a competitive market.[8] The methodology begins with the assumption that a hypothetical carrier is instantaneously replacing an ILEC's existing network with a new network comprised entirely of the most current, state-of-the-art technology and equipment.[9]

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[8] *See Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) (Posner, J.). *See also Verizon*, 535 U.S. at 501 (TELRIC is based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent's "historical investment" or the cost of the "actual network element being provided"); *Qwest Corp. v. Arizona Corp. Com'n*, 567 F.3d 1109, 1114 (9th Cir. 2009) (describing TELRIC prices as "below market" and "highly favorable to CLECs"); *USTA II*, 359 F.3d at 562 (the TELRIC formula results in very low rates that are "well below the costs the [incumbents] had actually historically incurred in constructing the elements").

[9] *See* 47 C.F.R. § 51.505(b)(1) ("The total element long run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers"); *Verizon*, 535 U.S. at 540 (Breyer, J., concurring in part and dissenting in part) ("the regulator must look to what it would cost a hypothetical perfectly efficient firm to supply that element in the future, assuming that the hypothetical firm were to build essentially from scratch a new, perfectly efficient communications network"); Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18,945, ¶ 31 (2003) ("UNE NPRM") (describing industry comments that TELRIC assumption of "new technology [being] deployed

In reality, carriers build networks over extended periods of time, and the equipment they use is therefore always a mix of new and older technologies. The FCC has recognized this disconnect between TELRIC and the reality of conditions in a competitive market:

> One of the central internal tensions in the application of the TELRIC methodology is that it purports to replicate the conditions of a competitive market by assuming that the latest technology is deployed throughout the hypothetical network . . . . In the real world, however, even in extremely competitive markets, firms do not instantaneously replace all of their facilities with every improvement in technology. Thus, even the most efficient carrier's network will reflect a mix of new and older technology at any given time.[10]

TELRIC also assumes that the hypothetical carrier builds the right amount of capacity to meet present and future demand.[11] But in competitive

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instantaneously and ubiquitously is unrealistic even in the most competitive markets").

[10] *TRO* ¶ 50.

[11] See *UNE NPRM* ¶ 49 (TELRIC models are designed "to build an efficient network today to serve all customer locations within a particular geographic area"); 47 C.F.R. § 51.505(b)(1) ("The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."); *Verizon*, 535 U.S. at 505.

markets, carriers rarely have exactly the right amount of capacity to meet demand during any given period, and any excess or insufficient capacity raises costs above ideally efficient levels. The fundamental reality, therefore, is that no carrier – neither an ILEC nor a CLEC – could build a network facility at a TELRIC cost.[12]

Although TELRIC significantly understates the actual costs of providing network elements, the Court held in *Verizon* that the methodology was not an unreasonable interpretation of § 251(d)(2) as applied to the "bottleneck" elements mandated by § 251(c)(3), where an ILEC's failure to provide access to the element "would impair the ability of the [competitor] . . . to provide . . . service[]."[13] In other

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("TELRIC requires ratesetters to calculate cost on the basis of 'the existing location of the incumbent['s] wire centers.'"); *id.* at 540 (Breyer, J., concurring in part and dissenting in part) ("the regulator must look to what it would cost a hypothetical perfectly efficient firm to supply that element in the future, assuming that the hypothetical firm were to build essentially from scratch a new, perfectly efficient communications network. The only concession to the incumbent's actual network is the presumption that presently existing wire centers which hold the switching equipment for a local area will remain in their current locations.").

[12] The below-market rates that TELRIC provides are analogous to the discounted rates normally available in the marketplace only with long-term commitments. For example, a long-term car lease (*e.g.*, a 36 month lease) is significantly less expensive on a per-day basis than renting a car for a few days. With TELRIC, however, CLECs have the benefit of low rates without making any long-term commitment, which is another deviation from normal competitive marketplaces.

[13] *See Verizon*, 535 U.S. at 510, 47 U.S.C. §251(d)(2)(B).

words, the question in *Verizon* was only whether TELRIC could be used for those network elements that meet the impairment test and are "unsuitable for competitive supply." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*").

But that holding is inapplicable when a CLEC ceases to be "impaired" by the unavailability of a facility, which occurs when alternative facilities are readily available in the market or when it becomes economically feasible for competitors to construct their own facility. At that point, requiring hypothetical TELRIC prices for facilities suitable for competitive supply would produce results directly opposite to the ends the Act is designed to achieve. That is, the availability of TELRIC priced network elements in this circumstance would actually suppress facilities-based competition, because the TELRIC price would be lower than a CLEC's cost to build the element itself. Thus, once competitors are no longer "impaired" by the unavailability of a facility from the ILEC on an unbundled basis, the justification for requiring the facility to be priced at TELRIC no longer exists.

Applying these principles in the instant case, using TELRIC pricing for entrance facilities would undermine the central purposes of the Act. In the 2005 *Triennial Review Remand Order* ("*TRRO*"),[4]

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[4] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review denied, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

the FCC ruled that entrance facilities no longer meet the impairment standard of Section § 251(c)(3) and are not bottleneck elements. The FCC found that these facilities have "unique operational and economic characteristics" that permit CLECs to self-provide or to obtain them from other competitive carriers. *TRRO* ¶¶ 138-139, 141.

The FCC's non-impairment finding was based on extensive evidence establishing that entrance facilities "are widely available" on a national basis. *Id.* Carriers demonstrated, for example, that CLECs "are steadily deploying their own entrance facilities," proving an absence of economic obstacles to self-deployment. *Id.* ¶ 138 & n.387. Other evidence established that competing carriers are having "success in finding non-incumbent LEC providers of entrance facilities," and that almost all competitively deployed transport links are entrance facilities." *Id.* ¶ 139 & n.393. Thus, Verizon established that it had recently migrated more than 32,000 entrance facility circuits to non-Verizon facilities, and BellSouth similarly reported that between 10 to 20 percent of the entrance facilities it had provided to CLECs had recently been replaced by other sources. *Id.* ¶ 139. Indeed, the evidence of the broad availability of non-ILEC sources of entrance facilities was so compelling that the FCC implemented its non-impairment determination immediately, finding that there was no justification for a gradual phase-out that some CLECs had requested. *Id.* ¶ 141 &n. 395.[15]

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[15] Since the *TRRO*, CLECs have continued in full force to shift from ILEC entrance facilities, either through self-provisioning or, more commonly, by obtaining a cross-connect

2. The FCC's non-impairment finding establishes that there is a competitive market for entrance facilities and thus no need to simulate competitive prices for those facilities through TELRIC rates. Indeed, applying TELRIC in a market that is competitive would undermine the very competition that the pricing methodology is meant to encourage when applied to bottleneck facilities.

Permitting CLECs to obtain entrance facilities at TELRIC rates would embrace a policy of long-term dependence on ILECs' facilities at below-cost prices – prices designed to apply solely to network elements CLECs cannot build or obtain from other sources.[16] It would have the effect of suppressing competition where the FCC has found it already exists. That is, if the prices that apply to bottleneck facilities were continued for entrance facilities, the CLECs and other providers that have been supplying entrance facilities would have difficulty competing with those prices and, over time, could have no choice but to

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within an ILEC's central office that is linked to a transmission facility purchased from a competitive provider. Many competitive providers are established in this business. For example, Zayo Group provides fiber alternatives to ILEC entrance facilities in approximately 150 markets in 30 states and the District of Columbia. Regional providers also are major competitive players in the market for entrance facilities. DukeNet Communications, FPL FiberNet, and DeltaCom's Interstate FiberNet, for example, provide these facilities even in small markets and low-density communities. These providers advertise their network facilities on their websites.

[16] See *Verizon*, 535 U.S. at 510, n. 27; *Local Competition Order*, ¶ 702.

stop supplying.[17] These providers would have no economically rational incentive to focus their resources and energy on investing in facilities and producing the technological innovations and consumer benefits the Act is designed to foster.[18]

Similarly, CLECs that have not yet invested in their own facilities would be less likely to do so if regulated prices were available in a competitive market. Any rational carrier would have to think twice about putting its capital at risk to build a network element if a below-cost leasing option were available.[19]

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[17] *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F.3d 370, 373-74 & n.4, 386 (6th Cir. 2010).

[18] *See Local Competition Order* ¶¶ 125-39.

[19] *See USTA I*, 290 F.3d at 424, 427 ("If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines"); *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007) (Boudin, C.J.), *on denial of reh'g*, 509 F.3d 13 (1st Cir. 2007) (per curiam) ("[M]aking a monopolist share ... 'essential facilities' can promote competition, but it can also retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition...."); *AT&T Comme'ns of Ill., Inc. v. Ill. Bell Tel.*, 349 F.3d 402, 404 (7th Cir. 2003) ("Prices for unbundled elements affect not only the allocation of income among producers but also new investment and innovation: if the price to rivals is too low, they won't build their own plant (why make capital investments when you can buy for less, one unbundled element at a time?), and the incumbents won't maintain or upgrade their facilities (why make costly capital investments if you have to sell local loops to rivals for less than it costs to produce them?)").

For these reasons, the FCC itself has emphasized that market prices must prevail when there is a competitive supply of a network element, and that it would be "counter-productive" to use TELRIC prices in this circumstance because those prices are designed, "at best" to merely "reflect the pricing of a competitive market."[20] Consistent with this pronouncement, federal courts have uniformly ruled that attempts by state commissions to apply TELRIC prices to non-impaired network elements violate the policies underlying the Act and are prohibited.[21] And precisely the same logic applies to efforts by state commissions and others to obtain entrance facilities at TELRIC rates.

In sum, the Act's ultimate objective is to move the telecommunications industry to competitive markets in which CLECs and ILECs invest, innovate and engage in facilities-based competition. That

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[20] *TRO* ¶ 651 (emphasis added).

[21] See *Qwest Corp.*, 567 F.3d at 1115 16 (state public utilities commissions lack authority under Section 271 to set cost-based pricing schemes); *Illinois Bell Telephone Co., Inc.*, 548 F.3d at 613 ("while network services provided by incumbent local exchange carriers that are necessary to enable a competing carrier to provide service are to be priced at cost, any additional network services that a Bell operating company (that wants to provide long-distance service) must provide unbundled access to can be priced at the market price"). *Verizon New England, Inc.*, 509 F.3d at 9 ("one issue is whether the states can require that section 271 elements be priced at TELRIC rates. The FCC orders provide carriers the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors. To allow the states to require the lower TELRIC rates directly conflicts with, and undercuts, the FCC's orders").

objective can only be achieved be removing regulatory controls, including the requirement of unbundling at TELRIC rates, when there is no longer competitive impairment for network elements. Perpetuating TELRIC rates for entrance facilities, as petitioners request, would undermine facilities-based competition, reduce innovation, and deny consumers the full benefits of a competitive market.

3. Petitioners do not offer any persuasive policy reasons in support of their attempt to obtain entrance facilities at TELRIC rates and fail to reconcile the clash between their position and the Act's policies. Instead, they rely on an implausible reading of words in FCC orders. In claiming that the duty in § 251(c)(2) to "provide . . . interconnection" includes a requirement to lease a transport facility spanning the distance between two networks, petitioners do not address the fact that the FCC's definition of "interconnection" expressly excludes "transport."[22] 47 C.F.R. § 51.5; AT&T Br. at 27. Related to this oversight, petitioners also fail to recognize that there is a fundamental difference between entrance facilities and the "interconnection facilities" that incumbents provide under § 251(c)(2).

As the Sixth Circuit explained, entrance facilities span the entire distance between a CLEC's

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[22] Section 251(c)(2) requires incumbents to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2).

switch and an ILEC's switch, which can be many miles.[23] By contrast, interconnection facilities are equipment within an ILEC's central office to which the competitor's entrance facility attaches.[24] ILECs perform a variety of tasks within their central offices, including providing cross-connect cables and conduit, to accommodate the interconnection of CLECs' entrance facilities. This equipment used to interconnect entrance facilities – which generally are provided at TELRIC prices and would continue to be under the Sixth Circuit's ruling – is distinct from the entrance facilities themselves.

This distinction directly undercuts petitioners' attempt to obtain entrance facilities at TELRIC rates. As demonstrated above, the FCC has found conclusively that entrance facilities are available from multiple sources and that there is a competitive market for them. By contrast, competitive markets do not exist for the interconnection facilities used to attach entrance facilities to ILECs' networks, because those facilities are contained entirely within the ILECs' central offices. Petitioners' position blurs these critical differences between entrance facilities and "interconnection facilities." The former are non-

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[23] *Michigan Bell Telephone Co.*, 597 F.3d at 372 ("But, just to be clear, an "entrance facility" is really just a fancy name for a cable or wire used to transport calls from a CLEC switch to an ILEC switch, and this wire can be very short (if the two switches are close together), or it can be very long, stretching for blocks or even miles (if the switches are far apart), depending on the relative locations of the two switches").

[24] *Michigan Bell Telephone Co.*, 597 F.3d at 373-74 & n.4, 386.

bottleneck facilities and, as such, should not be governed by TELRIC pricing.

B. The Act's Pricing Provision Confirms that Section 251(c)(2) does not Impose a Network Element Leasing Obligation

Petitioners' attempt to obtain entrance facilities at TELRIC rates also presumes incorrectly that the duty to interconnect established by § 251(c)(2) provides a means separate from § 251(c)(3) for CLECs to lease network elements. Nothing in § 251(c)(2) suggests that an ILEC's obligation to "provide . . . interconnection" includes a facilities leasing duty. Section 251(c)(2) only obligates ILECs to allow CLECs to connect their equipment to a point within the incumbent's network, not to lease any facilities. *See* AT&T Br. at 20-25.

This conclusion is also supported by 47 U.S.C. § 252(d)(1), which establishes the pricing standard for both the interconnection duty in § 251(c)(2) and the network unbundling duty in § 251(c)(3). Addressing pricing for the unbundling duty, § 252(d)(1) expressly applies to the "rate for [the] network elements" that ILECs must lease to CLECs. By contrast, addressing the interconnection duty, § 252(d)(1) applies to the "rate *for* the interconnection *of* facilities and equipment," without referring at all to rates for any facilities or equipment that ILECs are (in petitioners' view) required to lease to CLECs. This contrast further confirms that Congress did not intend in § 251(c)(2) to require ILECs to lease facilities and equipment.

and that the leasing obligation is contained only in § 251(c)(3).

Given the Act's clear distinction between the duty to lease network elements under §251(c)(3) and the obligation to "provide . . . interconnection" under §251(c)(2), it is not surprising that CLECs never claimed before the *TRO* that they had a right to lease entrance facilities under §251(c)(2). That argument came into fashion only after the FCC definitively ruled in the *TRRO* that ILECs are no longer required to provide entrance facilities under § 251(c)(3). As the timing suggests, this new argument was an opportunistic effort by some carriers to hang onto the below-cost TELRIC rates for entrance facilities that they had previously enjoyed.

In this regard, the CLECs' strategy was no different from their attempts to persuade state commissions and courts to apply TELRIC pricing to other network elements that the FCC has removed from the unbundling requirements of § 251(c)(3) but which certain ILECs (the regional Bell Operating Companies) are still required to provide under § 271 of the Act. While a few state commissions accepted that argument, the five courts of appeals that considered the claim unanimously rejected it.[25]

Writing for the Seventh Circuit in *Illinois Bell*, Judge Posner responded to this claim by emphasizing that consistent with the Act's objective

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[25] See, e.g., *Qwest Corp.*, 567 F.3d 1109, 1116 (9th Cir. 2009) (collecting cases); *Illinois Bell Tel. Co.*, 548 F.3d at 612-13 (Posner, J.); *Verizon New England, Inc.*, 509 F.3d at 7-9.

of creating competitive markets, CLECs "are allowed to demand access at a price below the market price to [incumbent] carriers' facilities only to the extent necessary to prevent those carriers from using their facilities to throttle their competitors." *Illinois Bell*, 548 F.3d at 611-12. It is therefore only "bottleneck facilities," he explained, that CLECs can demand access to at below-market rates. *Id.* at 612. Other non-bottleneck network elements to which an incumbent provides access "can be priced at the market price." *Id.* at 613.

The First Circuit, per then-Chief Judge Boudin, similarly found that for network elements the FCC has removed from the unbundling requirements of §251(c)(3), incumbents have "the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors." *Verizon New England, Inc.*, 509 F.3d at 9. The court ruled that "requir[ing] the lower TELRIC rates directly conflicts with, and undercuts, the FCC's orders" and is preempted." *Id.*

Here, just as in *Illinois Bell*, *Verizon New England*, and the similar decisions from the other courts of appeals, this case is, at bottom, an attempt by CLECs to obtain at a below- market rate a network element for which the FCC has found no impairment. As these decisions hold, that result would conflict with federal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 3 - 2011
OFFICE OF THE CLERK

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Nos. 10-313, 10-329

In the Supreme Court of the United States

TALK AMERICA, INC., PETITIONER,
v.
MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T MICHIGAN, RESPONDENT.

ORJIAKOR ISIOGU, *ET AL.*, PETITIONERS,
v.
MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T MICHIGAN, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* COMPTEL IN SUPPORT OF PETITIONERS

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FEBRUARY 2011

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INTEREST OF *AMICUS CURIAE*[1]

COMPTEL is the leading national trade association representing communications service providers and their supplier partners. COMPTEL's members provide local exchange telecommunications services in competition with incumbent local exchange carriers ("ILECs") including Respondent Michigan Bell Telephone Company. COMPTEL's members must interconnect their networks with the networks of the ILECs in order for their customers to be able to make calls to and receive calls from customers of the ILECs. COMPTEL's members purchase entrance facilities – *e.g.*, transmission links -- from the ILECs in order to interconnect their networks with the ILECs' networks for the purpose of exchanging traffic. As a result, COMPTEL and its members have a significant interest in the question presented in this case which concerns the obligation of the ILECs under 47 U.S.C. § 251(c)(2) to make entrance facilities available to requesting carriers for interconnection purposes at cost-based rates.

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[1] Pursuant to Rule 37.6, COMPTEL hereby certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* COMPTEL has made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.3, COMPTEL certifies that counsel of record for all parties have consented to its filing in letters on file with the Clerk's office submitted herewith.

SUMMARY OF ARGUMENT

Sections 251(c)(2) and 251(c)(3) of the Communications Act (the "Act"), 47 U.S.C. §§ 251(c)(2), 251(c)(3), impose two different and discrete obligations on ILECs. Pursuant to Section 251(c)(2), ILECs are required to provide requesting carriers interconnection to their networks for the transmission and routing of telephone exchange (local) and exchange access (toll) services. Pursuant to Section 251(c)(3), ILECs are required to provide requesting carriers access to their network elements on an unbundled basis for the provision of telecommunications services to the carriers' customers if the failure to provide such access would impair the carriers' ability to provide a service. ILECs are required to charge cost-based rates both for interconnection facilities and for unbundled network elements. 47 U.S.C. §252(d)(1).

Entrance facilities are the physical transmission links connecting ILEC networks with the networks of competitive local exchange carriers ("CLECs"). The Sixth Circuit read the Federal Communications Commission's ("FCC") rule[2] limiting requesting carriers' rights to access entrance facilities on an unbundled basis pursuant to Section 251(c)(3) of the Act to eliminate their rights to obtain entrance facilities for the transmission and routing of

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[2] 47 C.F.R. § 319(e)(2)(i).

telephone exchange and exchange access service pursuant to Section 251(c)(2) of the Act. This reading cannot be reconciled with the plain language of the statute. It is also at odds with the FCC's rules implementing the statute and the agency's interpretation of those rules, to which the Sixth Circuit accorded no deference in contravention of the precedent of this Court. Confronted with the same issue, the Seventh, Eighth and Ninth Circuits all properly deferred to the FCC's interpretation of the rights and obligations of telecommunications carriers under the Act and the rules. The Court should reverse the Sixth Circuit's decision and correct its clear misconstruction of the statute and the FCC's rules.

ARGUMENT

The Michigan Public Service Commission correctly determined that Respondent Michigan Bell is obligated under Section 251(c)(2) of the Act, 47 U.S.C. § 251(c)(2), to make entrance facilities used for interconnection purposes available to competitive local exchange carriers ("CLECs") at total element long run incremental cost ("TELRIC") calculated in accordance with Section 252(d)(1) of the Act, 47 U.S.C. §252(d)(1). The Public Service Commission's ruling is consistent with the FCC's rules and precedent interpreting the Act as well as with the decisions of the three other circuit courts that have

addressed the issue. The decision should have been upheld. In reaching the opposite conclusion – *i.e.*, that ILECs may charge their competitors whatever they want for entrance facilities used for interconnection purposes -- the Sixth Circuit improperly conflated the obligations imposed on ILECs by Section 251(c)(2) of the Act and with those imposed by Section 251(c)(3) of the Act. In failing to distinguish between the rights of CLECs to obtain TELRIC-priced access to entrance facilities used to exchange traffic with ILECs and the restrictions on their rights to obtain unbundled access to TELRIC-priced entrance facilities used for other purposes, the Sixth Circuit significantly pared back the interconnection duties Congress deemed necessary for ILECs to fulfill in an effort to ensure that telephone subscribers are able to call one another regardless of the identity of their service provider. The Sixth Circuit's decision, *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F. 3d 370 (6th Cir. 2010), must be reversed.

1. The ILEC's Duties Under Section 251(c)(2) And Section 251(c)(3) Are Not The Same

Congress enacted the Telecommunications Act of 1996[3] to open local telephone markets to competition. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002). Prior to the passage of the Telecommunications Act, ILECs had the exclusive right to provide local telephone service in their territories and their ubiquitous networks were the only source of connections to customers. *Id.* at 490-491. To open the markets to competition and to facilitate competitive entry, Congress imposed certain obligations on the ILECs and granted certain rights to new entrants. Two of those rights and obligations are at the center of this dispute. Section 251(c)(2) of the Act imposes on ILECs the duty to provide requesting telecommunications carriers interconnection to their networks for the transmission and routing of telephone exchange service and exchange access at TELRIC rates. 47 U.S.C. §§251(c)(2), 252(d)(1). ILEC and CLEC networks must be interconnected in order for ILEC customers to be able to make calls to and receive calls from CLEC customers and for CLEC customers

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[3] Pub.L. 104-104, 110 Stat. 56. The Telecommunications Act of 1996 was codified in various provisions of the Communications Act of 1934, as amended, 47 U.S.C §§151, *et seq.*, including Sections 251 and 252.

to be able to make calls to and receive calls from ILEC customers.

Section 251(c)(3) of the Act imposes on ILECs the duty to provide requesting telecommunications carriers, also at TELRIC rates, access to their network elements on an unbundled basis for the provision of telecommunications service. 47 U.S.C. §§251(c)(3), 252(d)(1). CLECs may combine the unbundled network elements they purchase from the ILECs with their own network facilities to provision service to their customers.

In determining which network elements ILECs are required to make available at TELRIC rates, Congress directed the FCC to consider whether the failure to provide unbundled access to a particular network element would impair the ability of a requesting carrier to provide service. 47 U.S.C. §251(d)(2). Although the FCC had originally determined that CLECs were entitled to purchase access to unbundled entrance facilities under Section 251(c)(3), it changed that assessment in 2005 when it found that CLECs were not impaired in providing telecommunications service without access to unbundled entrance facilities at TELRIC rates. At the same time, the FCC explained that its non-impairment determination under Section 251(c)(3) did not adversely affect the rights of CLECs to obtain TELRIC-priced entrance facilities for the

transmission and routing of telephone traffic pursuant to Section 251(c)(2). *Unbundled Access To Network Elements And Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 at 2611, ¶140 (2005) ("*TRRO*"), *petitions for review den., Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). Unlike Section 251(c)(3), Section 251(c)(2) does not call for an impairment determination.

In ruling that CLECs are not entitled to TELRIC-priced entrance facilities for the purpose of interconnection, the Sixth Circuit failed to recognize that an ILEC's interconnection duty pursuant to Section 251(c)(2) is independent of its duty to provide access to unbundled network elements. The plain language of Section 251 makes clear that subsection (c)(2) (interconnection) and subsection (c)(3) (access to unbundled network elements) impose separate and distinct obligations on ILECs. The FCC's implementing regulations eliminate any doubt about the independence of the obligations. Section 51.307(b) of the FCC's rules states that the duty to provide access to unbundled network elements pursuant to Section 251(c)(3) "includes a duty to provide a connection to an unbundled network element *independent* of any duty to provide interconnection" pursuant to Section 251(c)(2) of the Act. 47 C.F.R. §51.307(b) (emphasis added). *See*

also, Pacific Bell Telephone Co. v. California Public Utilities Comm'n, 621 F.3d 836, 845 (9th Cir. 2010) (duties of ILECs under Section 251(c)(2) are independent of duties under Section 251(c)(3)).

Despite the plain language of the statute and the rule as well as the FCC's reaffirmation in the *TRRO* that CLECs continue to have access to TELRIC-priced entrance facilities used for interconnection purposes, the Sixth Circuit applied the FCC's finding that CLECs are not *impaired* in providing telecommunications service without access to unbundled entrance facilities pursuant to Section 251(c)(3) to foreclose the independent right of CLECs to obtain access to entrance facilities for the transmission and routing of telephone traffic pursuant to Section 251(c)(2). In so doing, the Sixth Circuit impermissibly expanded the reach of §51.319(e)(2)(i) of the FCC's rules, 47 C.F.R. § 51.319(e)(2)(i). Section 51.319 is entitled "Specific Unbundling Requirements" and subsection (e)(2)(i) states that ILECs are not obligated to provide CLECs *unbundled access* to entrance facilities that do not connect a pair of ILEC wire centers. Section 51.319(e)(2)(i) was adopted to reflect the FCC's finding that CLECs are not impaired without access to unbundled entrance facilities in provisioning service to their customers. It was *not* intended to curtail CLECs' rights to obtain access to entrance facilities used to interconnect with the ILEC's

network for the transmission and routing of telephone exchange and exchange access service. The Sixth Circuit's reading conflicts with the plain language of the rule which by its terms is limited to unbundling requirements.

II. The Sixth Circuit Substituted Its Judgment For That Of The Expert Agency

The Sixth Circuit's analysis of the rights and obligations of ILECs and CLECs under Section 251(c) does not withstand scrutiny. In addition to running counter to the decisions of the three other circuit courts that have considered the issue,[4] the Sixth Circuit reached its decision by substituting its own judgment for that of the expert agency not only with respect to the manner in which telephone networks are designed and operate but also with respect to the meaning of the expert agency's own regulations.

As this Court has recognized, ascertaining the meaning of the Telecommunications Act of 1996 often presents challenges. Congress has delegated to the FCC the authority to resolve any ambiguities.

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[4] *Pacific Bell Telephone Co. supra*; *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n.*, 530 F. 3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009), *Illinois Bell Telephone Co. v. Box*, 526 F. 3d 1069 (7th Cir. 2008).

The FCC's interpretations of the rights and duties of carriers under the Act are entitled to deference so long as they are reasonable:

> It would be a gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. This is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents – and the Commission has chosen in some instances to read it that way. But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. We can only enforce the clear limits that the 1996 Act contains. . . .

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 397 (1999). *See also, National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (ambiguities in a statute within an agency's jurisdiction to administer are delegations of authority to fill the statutory gap

and courts should accept the agency's construction so long as it is reasonable).

Fifteen years ago, the FCC wisely concluded that national rules for interconnection pursuant to Section 251(c)(2) are necessary to promote Congress' goal of "creating conditions that will facilitate the development of competition in the local exchange market." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15591-92 at ¶179 (1996), *reversed in part on other grounds, AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Local Competition Order*"). The term "interconnection" is not defined in the Act. The FCC's interpretation of the term is therefore entitled to considerable weight and the deference of the reviewing court so long as it is reasonable. *Competitive Telecommunications Ass'n. v. FCC*, 117 F. 3d 1068, 1071 (8th Cir. 1997).

Section 51.5 of the FCC's rules, 47 C.F.R. §51.5, defines interconnection as the "linking of two networks for the mutual exchange of traffic" and defines "equipment necessary for interconnection" for purposes of Section 251(c)(2) as the equipment used to interconnect with the ILEC's network for the transmission and routing of telephone exchange service, exchange access service or both. The FCC has found that Section 251(c)(2) expressly requires

ILECs to provide access to the transmission facilities CLECs need in order to interconnect with the ILEC network. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17203 at ¶ 366 (2003) ("*TRO*"), *vacated in part and remanded in part on other grounds, United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir 2004).

Interconnection of networks for the purpose of exchanging traffic is an arrangement that benefits both the ILEC and the CLEC equally by allowing each of their respective customers to make calls to and receive calls from the customers of the other. *Local Competition Order*, 11 FCC Rcd at 15781, ¶553; *Pacific Bell Telephone Co.*, 621 F. 3d at 847. In the *Local Competition Order*, the FCC explained that the Section 251(c)(2) interconnection duty requires ILECs "to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks." 11 FCC Rcd. at 15614-15615, ¶ 224.

There is no dispute that entrance facilities are the physical transmission facilities -- usually fiber optic links with tremendous capacity -- that connect ILEC networks and CLEC networks. *Michigan Bell*

Telephone Co., 597 F. 3d at 372. What the Sixth Circuit failed to appreciate is that various types and jurisdictional classifications of communications traffic can and do ride a single entrance facility (on different virtual channels) and that what distinguishes the different types and jurisdictions of traffic is the regulatory treatment that each is accorded, not the physical facilities they traverse.

There is also no dispute that the FCC has determined pursuant to Section 251(c)(3) that CLECs are not impaired in providing telecommunications services to their customers without access to unbundled entrance facilities at TELRIC rates. This finding of non-impairment, however, does not eliminate the right of CLECs to obtain TELRIC-priced entrance facilities used for interconnection purposes pursuant to Section 251(c)(2). The FCC has explained the distinction between interconnection and access to unbundled network elements:

> [I]nterconnection is different from "access" to unbundled elements. . . . Section 251(c)(2) requires that interconnection be provided for the "transmission and routing of telephone exchange service and exchange access." Section 251(c)(3), in contrast, requires the provision of access to unbundled elements to allow requesting carriers to provide a "telecommunications service." The

> term "telecommunications service" by definition includes a broader range of services than subsection (c)(2) allows for interconnection. Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection. If we were to conclude that "access to unbundled network elements" pursuant to subsection (c)(3) could only be achieved by means of interconnection under subsection (c)(2), we would be limiting, in effect, the uses to which unbundled elements may be put, contrary to the plain language of Section 251(c)(3) and standard canons of statutory construction.

Local Competition Order, 11 FCC Rcd at 15636-37, ¶270.[5] Despite this explication of the differences in the services provided over Section 251(c)(2) facilities and Section 251(c)(3) facilities, the Sixth Circuit misconstrued the language of Section 251(c)(3) and the FCC's entrance facility unbundling rule to limit

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[5] The Act defines "telecommunications service" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used. "Telecommunications" in turn is defined as the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received. 47 U.S.C. §§153(43), (46).

the interconnection rights of CLECs under Section 251(c)(2).

There is no basis for the Sixth Circuit's conclusion that entrance facilities -- that is, the physical transmission facilities connecting networks -- cannot be interconnection facilities even when they are used to interconnect an ILEC network and a CLEC network for the mutual exchange of traffic because "neither the FCC nor any court has ever defined interconnection" or "entrance facility" by the use that is made of the transmission facility. *Michigan Bell Telephone Co.*, 597 F.3d at 383-384. The Sixth Circuit is mistaken. The FCC does in fact define the regulatory treatment of transmission facilities and whether they are priced at TELRIC rates or unregulated rates by the use that is made of those facilities. *See e.g.*, 47 C.F.R. §51.305(b) (carrier that requests interconnection *for a purpose other than providing telephone exchange service and/or exchange access service* to others not entitled to TELRIC priced interconnection pursuant to Section 251(c)(2)); 47 C.F.R. §307(a) (ILEC shall provide unbundled access to network elements *for the provision of a telecommunications service*); 47 C.F.R. §51.309(b) (a requesting carrier may not access an unbundled network element *for the exclusive provision of mobile wireless service or interexchange*

service).[6] *See also, Competitive Telecommunications Ass'n. v. FCC*, 117 F. 3d at 1071-1072. ("Congress intended for 'the transmission and routing of telephone exchange and exchange access' only to describe what the interconnection, the physical link, would be *used* for.")[7]

Consistent with industry practice, the FCC has long recognized that CLECs use the "transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic" and that Section 251(c)(2) applies only to the former use. *TRO*, 18 FCC Rcd at 17203, ¶365. If the physical transmission link is used for the transmission and routing of telephone exchange or exchange access traffic between the ILEC and the CLEC, the CLEC is entitled to TELRIC pricing. If the CLEC uses the physical transmission link to reach its collocation space in the ILEC's wire center and access unbundled network elements or to transport calls between its own customers, the CLEC is not entitled to TELRIC pricing.

The FCC acted well within its authority in interpreting Section 251(c)(2) to require ILECs to make entrance facilities available for

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6 Emphasis added.

7 Emphasis added.

interconnection purposes at TELRIC rates regardless of whether Section 251(c)(3) requires ILECs to provide CLECs unbundled access to entrance facilities for the purpose of backhauling traffic or providing any other telecommunications service. *TRO*, 18 FCC Rcd. at 17203-05 ¶¶365-367 and nn. 1113 and 1117. In order to justify its conclusion that entrance facilities are not interconnection facilities subject to TELRIC rates even when they are used to connect an ILEC network and a CLEC network for the *transmission and routing of telephone exchange service*, the Sixth Circuit had to reject the expert agency's analysis with respect to the different uses telecommunications carriers make of entrance facilities and the different statutory rights and obligations that attach to those different uses of the facilities. *Michigan Bell Telephone Co.*, 597 F. 3d at 382-383.

The Sixth Circuit found the FCC's interpretation of CLECs' interconnection rights under Section 251(c)(2) to be "so plainly erroneous or inconsistent with the regulation" as to warrant no deference. *Michigan Bell Telephone*, 597 F.3d at 375. But the FCC's interpretation is neither erroneous nor inconsistent with any regulation. The purported inconsistency the court found was with 47 C.F.R. §51.319(e)(2)(i) of the FCC's rules, the *unbundling* regulation that very clearly states that ILECs are

not required pursuant to Section 251(c)(3) to provide unbundled access to entrance facilities that do not connect a pair of ILEC wire centers. *Michigan Bell Telephone Co.*, 570 F. 3d at 382. As noted, when the FCC adopted this regulation in 2005, it contemporaneously clarified that its finding pursuant to Section 251(c)(3) that CLECs were not impaired without access to unbundled entrance facilities used to provide telecommunications services does not affect the right of CLECs pursuant to Section 251(c)(2) to obtain TELRIC-priced entrance facilities to the extent that they use them to interconnect with the ILEC's network for the mutual exchange of traffic. *TRRO*, 20 FCC Rcd 2533 at 2609-2612, ¶¶ 136-140.

The FCC's reaffirmation of CLECs' rights to entrance facilities used for interconnection purposes at TELRIC rates under Section 251(c)(2) of the Act is not plainly erroneous or inconsistent either with the statute or with its finding that CLECs may not obtain unbundled access to entrance facilities at TELRIC rates when they use them for other purposes, including backhauling their own traffic. The FCC's interpretation of the scope of §51.319(e)(2)(i) and its impact on the interconnection rights of CLECs under Section 251(c)(2), therefore, is entitled to deference. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009). By declining to defer to the FCC's

interpretation, the Sixth Circuit improperly substituted its construction of the statute and the FCC's implementing regulation for that of the FCC in a very technical area. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

In an effort to reconcile its reading of §51.319(e)(2)(i) of the FCC's regulations with the explanatory language in the *TRRO*, the court rephrased the pertinent provisions of the rule and the *TRRO* to say that ILECs are not required to provide entrance facilities at TELRIC rates under any circumstances. *Michigan Bell Telephone*, 597 F.3d at 379. The Sixth Circuit erroneously turned a blind eye to the fact that the regulation does not speak to the ILECs' obligation to provide entrance facilities for interconnection purposes pursuant to Section 251(c)(2) of the Act, much less relieve ILECs of that obligation. The three other circuit courts that have addressed the issue of the interplay between §51.319(e)(2)(i) of the regulations and Section 251(c)(2) of the Act have properly sustained the FCC's interpretation of the statute and its own regulations. *Pacific Bell Telephone Co.*, 621 F. 3d at 846-47 (FCC's interpretation that Section 251(c)(2) requires ILECs to lease entrance facilities at TELRIC rates to CLECs for interconnection purposes is reasonable and entitled to deference); *Southwestern Bell Telephone, L.P. v. Missouri Public*

Service Commission, 530 F.3d 676 683-84 (8th Cir. 2008) (state commission properly read FCC rules to mean that ILECs must provide CLECs access to entrance facilities at TELRIC rates if necessary for interconnection); *Illinois Bell Telephone Co. v. Box*, 526 F. 3d 1069, 1072 (7th Cir. 2008) (federal law requires that entrance facilities used for interconnection must be priced at TELRIC). The Sixth Circuit should have done the same.

CONCLUSION

For the foregoing reasons and those set forth in the Petitioners' briefs, COMPTEL respectfully requests that the Court reverse the Sixth Circuit's decision.

Respectfully submitted.

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February 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 3 - 2011
OFFICE OF THE CLERK

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Nos. 10-313 & 10-329

In the Supreme Court of the United States

TALK AMERICA INC., PETITIONER

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

ORJIAKOR N. ISIOGU, COMMISSIONER, MICHIGAN PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR SPRINT NEXTEL CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR SPRINT NEXTEL CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE

Sprint Nextel Corporation (Sprint) is one of the largest communications providers in the United States. Serving more than 48 million customers, Sprint is the Nation's third-largest provider of wireless communications and one of the largest providers of wireline long-

distance service. In conjunction with various cable companies, Sprint also provides local telephone service.

In all of those markets, Sprint heavily depends on the ability to connect to the networks of incumbent local exchange carriers—and, specifically, on the ability to connect its customers with customers of those incumbents. As a result, the price that incumbents charge for access to their networks—access that they alone control—is of paramount importance to Sprint. That is particularly true because Sprint's two primary competitors for wireless service own a majority of the Nation's incumbent carriers (and therefore control access to a substantial portion of the Nation's local telephone network). Payments to incumbents already constitute a significant cost of Sprint's services, and affirmance of the erroneous decision below would permit incumbents unilaterally to increase that cost, to the detriment of Sprint's customers and of competition in the telecommunications industry more generally. Accordingly, Sprint has a significant interest in the disposition of this case.[1]

STATEMENT

Sprint respectfully submits that the Court cannot meaningfully review the court of appeals' decision in this case without a full understanding of the technology of telephone networks and the statutory and regulatory framework applicable to the instant dispute. Sprint in-

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[1] Pursuant to Rule 37.6, Sprint affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than Sprint or its counsel made such a monetary contribution. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

cludes this statement in an effort to assist the Court in obtaining that understanding.

1. A "local exchange" is simply a network that connects "terminals" (*e.g.*, telephones) in a particular locality. Each terminal is connected by means of a wire known as a "local loop" to a "switch." Switches route calls to their proper destinations. Switches were originally operated manually; an operator would take an incoming call, ask for its destination, and forward the call to that destination. Those days, of course, are long gone, and switches now operate automatically, based on signals that accompany the call. Calls typically travel through more than one switch before reaching their final destination; switches that connect to local loops are known as "local switches" or "end office switches," and they are generally housed in a building known as the "local office" or "end office."

A local switch either directs a call between two terminals that are connected to that switch, or (more commonly) aggregates calls that are ultimately destined for other switches into a single wire known as a "trunk." Just as a local loop transmits a single call between a terminal and a local switch, a trunk transmits numerous calls between a local switch and a "tandem switch." A tandem switch is a switch that is connected only to other switches; tandem switches are housed in a building known as a "tandem office."[2] When a call arrives at a tandem switch, it is directed to its next destination, which may be another tandem switch or a local switch. The call eventually reaches the appropriate local switch, which in turn routes the call to the destination terminal.

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[2] The term "central office" refers to any office that houses switches, including end offices and tandem offices.

See generally *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 489-490 (2002).

As the foregoing explanation illustrates, it is "easy to see" why a company that owns a local exchange—known as an "incumbent local exchange carrier" (ILEC)—would have an "almost insurmountable competitive advantage" absent regulatory intervention. *Verizon*, 535 U.S. at 490. A would-be competitor could not compete with the incumbent "without coming close to replicating the incumbent's entire existing network"—the cost of which would be extraordinary if not prohibitive, not least because the competitor would need to install local loops to every single residence and business in a given locality. *Ibid.* Because of its control of the local market, moreover, the incumbent could impose substantial fees as a condition of obtaining access or connecting to the incumbent's customers—or choose not to permit it at all. *Id.* at 490-491.

Until the early 1980s, nearly all of the local exchanges in the United States were controlled by the American Telephone & Telegraph Company (AT&T), which "possess[ed] overwhelming monopoly power" in the markets for local and long-distance services alike. *Verizon*, 535 U.S. at 480. Pursuant to a 1982 consent decree, AT&T's local telephone operations were broken up into seven regional Bell operating companies, known as the "Baby Bells." See *United States* v. *American Tel. & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). Each of those companies, however, continued to have monopoly power in the region it controlled. See *Verizon*, 535 U.S. at 475-476.

2. The Telecommunications Act of 1996 (Act) was intended, *inter alia*, to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises." *Verizon*, 535 U.S. at 476. The Act obligates an incumbent to

"share its network with competitors," which include "competitive local exchange carriers" (CLECs) and "commercial mobile radio service" (CMRS) providers. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

The Act provides three primary means of promoting competition between incumbents and competitors. First, a competitor can simply buy and resell an incumbent's "telecommunications service"; the incumbent is required to provide that service to the competitor at wholesale prices. *Verizon*, 535 U.S. at 491; 47 U.S.C. 251(b)(1) and (c)(4). Second, a competitor can "interconnect its own facilities with the incumbent's network." *AT&T*, 525 U.S. at 371; 47 U.S.C. 251(a) and (c)(2). Third, a competitor can "lease certain of an incumbent's 'network elements.'" *Verizon*, 535 U.S. at 491; 47 U.S.C. 251(c)(3) and (d)(2). This case implicates the last two of those methods.

If a competitor opts to "interconnect its own facilities with the incumbent's network," *AT&T*, 525 U.S. at 371, Section 251(c)(2) of the Act obligates the incumbent to provide interconnection on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2)(B) and (D). The parties are permitted to negotiate those rates privately. If they are unable to reach agreement, the matter is referred for arbitration to the relevant state utility commission, which determines a rate "based on the cost * * * of providing the interconnection" plus a "reasonable profit." 47 U.S.C. 252(d)(1). The Federal Communications Commission (FCC or Commission) has established the methodology for determining that rate, which is known as the "total element long-run incremental cost" (TELRIC) rate. As the District of Columbia Circuit has explained, "TELRIC rates are akin to wholesale prices." *Covad Commc'ns Co.* v. *FCC*, 450 F.3d 528, 532 (2006). Thus,

when a competitor exercises its statutory right to interconnect with the incumbent's network, the "wholesale" TELRIC rate sets the price that the competitor pays in the absence of an otherwise negotiated rate.[3]

If, however, a competitor chooses to "lease certain of an incumbent's 'network elements,'" *Verizon*, 535 U.S. at 491, the appropriate rate may be either the TELRIC rate or a higher rate. The appropriate rate turns on whether the particular "network element" at issue is an "unbundled network element." 47 U.S.C. 251(c)(3). If it is, then the TELRIC rate applies; if it is not, the incumbent may charge a higher rate of its choosing. The FCC determines whether a network element is "unbundled" by considering, *inter alia*, whether "failure to provide access to [the element]" would "impair" a competitor's ability to provide service. 47 U.S.C. 251(d)(2). Not surprisingly, competitors "favor widespread unbundling" because it would reduce their costs, but incumbents do not. *Covad*, 450 F.3d at 532.[4] Critically for purposes of

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[3] The FCC has stated, and the parties do not dispute, that incumbents' obligations under Section 251(c)(2) extend to both wireline and wireless competitors. See 47 C.F.R. 20.11; Br. in Opp. 18 n.21.

[4] In *Covad*, the D.C. Circuit provided an illustration of the "unbundling" concept:

> Suppose a [competitor] (such as Covad) wants to serve customers in Washington, D.C. One way of doing so is for Covad to purchase its own switches, trunks, and loops, which it can then use to offer service to its new customers. However, given that the local [incumbent] (*e.g.*, Verizon) has already deployed switches, trunks, and loops to serve the market, it might be economically impossible for Covad to duplicate competitively Verizon's infrastructure. Through regulatory unbundling, however, Covad might be able to lease Verizon's switches, trunks, and loops as [unbundled network elements]. Covad could then use

this case, the "impairment" test applies only to a competitor's efforts to lease certain network elements under Section 251(c)(3), not to a competitor's efforts to interconnect its own facilities with the incumbent's network under Section 251(c)(2). Regardless of whether a competitor can obtain access to individual network elements at TELRIC rates, therefore, the competitor retains the right to interconnect its network to an incumbent's network at those lower rates. See *AT&T*, 525 U.S. at 371.

Following the Act's passage in 1996, a protracted dispute ensued between competitors and incumbents over the meaning of "impairment" for purposes of Section 251(c)(3). Competitors argued for a broader interpretation of that term, such that more network elements would be considered "unbundled" and thus available to them on an individual basis at TELRIC rates; incumbents argued for a narrower interpretation. The FCC's first two efforts to define "impairment" were invalidated—first by this Court, see *AT&T*, 525 U.S. at 387-392, and then by the D.C. Circuit, see *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 421-428 (D.C. Cir. 2002) (*USTA I*), cert. denied, 538 U.S. 940 (2003).

3. In the meantime, following the Act's passage, competitors began invoking the Act in efforts to compete with incumbents. As is relevant here, those efforts fell into two basic paradigms.

First, some competitors elected to build their own networks—*i.e.*, their own switches along with wires between those switches and their customers' terminals. Such a competitor had no need to lease network ele-

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combinations of [unbundled network elements] to cobble together a network and compete against Verizon in Washington.

450 F.3d at 532.

ments of the incumbent's network, but it did still need *access* to the incumbent's network (so that its customers could call the incumbent's, and vice versa). The physical means of connecting two networks is through a "facility": *viz.*, a medium such as a fiber-optic cable through which communications are transmitted. As a general matter, such "facilities" existed even before the Act (*e.g.*, to provide long-distance providers with access to the incumbent's local exchange network, and vice versa), and were often added by the incumbents themselves to meet additional demand (*e.g.*, to accommodate population growth in a particular locality). After the Act, a competitor seeking access to an incumbent's network could obtain it simply through a single strand (potentially one of thousands) of the fiber-optic cable stretching from one of its switches to one of the incumbent's switches. If the customer of one of those competitors called an incumbent's customer, the call would travel (1) through the competitor's network to the competitor's switch; (2) across the connecting facility to the incumbent's switch; and (3) through the incumbent's network to its final destination. See 10-329 Pet. Br. 23 (depicting a call from CLEC Customer C to ILEC Customer A).

Second, some competitors sought to lease elements of incumbents' networks, rather than build particular pieces of their own network. For example, such a competitor might lure a local telephone customer away from the incumbent—and, in so doing, still need to lease the local loop that formerly connected the customer with the incumbent's local office. If that former customer of the incumbent called one of the incumbent's current customers, the call would not simply pass through the incumbent's local switch and then directly onward to its final destination along the incumbent's network, as it did before. Instead, it would terminate at a "collocation" site, a

portion of the incumbent's local office which the competitor leases and in which it places its own equipment to aggregate the local loops it controls. See 47 C.F.R. 51.5. From the collocation, the call would travel onward to another collocation at the incumbent's tandem office and then to one of the competitor's switches. Only at that point would the call travel from the competitor's switch across to one of the incumbent's switches and, via the incumbent's network, on to its final destination. See 10-329 Pet. Br. 23 (depicting a call from CLEC Customer B to ILEC Customer A).

There is one crucial distinction between the two paradigms we have just discussed. In the first paradigm, only one "facility" is used, and it connects the competitor's network to the incumbent's network (specifically, a competitor's switch to an incumbent's switch). In the second paradigm, however, two "facilities" are used: one to connect the competitor's collocation at the tandem office to one of the competitor's own switches, and the other (as in the first paradigm) to connect the competitor's network to the incumbent's network. Those "facilities" may in fact be two strands in the same fiber-optic cable, because the call may effectively double back on itself when it travels from the collocation in the incumbent's tandem office to the competitor's switch and then back to the incumbent's switch in the same tandem office. But they are unquestionably separate and distinct facilities, whose signals never cross and which serve different and dedicated functions. The facility common to both paradigms, which we shall call "Facility A," connects a competitor's network to the incumbent's network for the purpose of exchanging traffic between the two networks; the other, which we shall call "Facility B," actually connects one component of the competitor's network (the competitor's collocation) to another component of the

competitor's network (the competitor's switch), for a purpose known as "backhauling."

Competitors took advantage of both of these paradigms. The first paradigm describes wireless providers such as Sprint (which have their own network infrastructure in the form of towers and switches), as well as cable companies providing local telephone service (which employ their own wires and facilities to reach end users). Customers of these entities are completely outside the incumbent's network; as such, a provider need only have the ability to connect its network to an incumbent's network and to transmit its customers' calls to an incumbent's customers—thus requiring only one facility (Facility A). By contrast, a competitor for local telephone service that uses portions of the incumbent's network to provide that service will often have customers *within* the incumbent's network. For those customers, the competitor requires *two* facilities: one to "backhaul" a call out from the customer to the competitor's switch (Facility B), and another to connect to the incumbent's network and transmit the call to an incumbent's customer (Facility A).

4. In 2003, after its first two efforts to define "impairment" were invalidated, the FCC issued its third set of rules on the issue. See *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003) (*Triennial Review Order* or *TRO*). In addition to setting forth a new interpretation of the impairment standard, the FCC made a series of findings critical to this case. As is relevant here, the FCC undertook to define which types of "dedicated interoffice transmission facilities," or "dedicated transport," should be considered unbundled. As the name suggests, an "interoffice transmission facility" is a facility (again, such as a strand of fiber-optic cable) that

carries traffic between two offices in a network; a "dedicated" facility is simply one that is used by a single provider. *TRO*, 18 F.C.C.R. at 17,201 (¶ 361).

Before determining whether particular types of "dedicated transport" qualified as unbundled elements under its new impairment standard, the FCC first had to decide what exactly constituted "dedicated transport." In a reversal of a prior position, the FCC determined that it understood "dedicated transport" to include only facilities between an incumbent's own switches. *TRO*, 18 F.C.C.R. at 17,202 (¶ 362). Significantly, the FCC noted that competitors "require a transmission link from * * * the incumbent LEC network to their own equipment located elsewhere." *Id.* at 17,203 (¶ 365). According to the FCC, competitors "use these transmission connections between incumbent LEC networks and their own networks *both* for interconnection *and* to backhaul traffic." *Ibid.* (emphases added). The FCC reasoned that, "[u]nlike the facilities that incumbent LECs explicitly must make available for [S]ection 251(c)(2) interconnection [*i.e.*, Facility A in the examples discussed above], * * * the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks *for the purpose of backhauling traffic* [*i.e.*, Facility B]." *Ibid.* (emphasis added; footnote omitted).

The FCC ultimately determined that the latter type of transmission facilities—*i.e.*, facilities used for backhauling, or Facility B—"exist *outside* the incumbent LEC's local network" and therefore "are not appropriately included in the definition of dedicated transport." *TRO*, 18 F.C.C.R. at 17,203 (¶ 366). At the same time, however, the FCC noted that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,'" *i.e.*, Facility A,

"[S]ection 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *Id.* at 17,204 (¶ 366) (first alteration in original).

The FCC supported its determination that facilities used for backhauling do not qualify as "dedicated transport" by discussing the economics of those facilities. *See TRO*, 18 F.C.C.R. at 17,204 (¶ 367). The FCC explained at length why "backhaul facilities" are different from transport facilities that are entirely within an incumbent's network, citing the greater control of competitors over the design and placement of backhaul facilities and the potential for cost savings if competitors deploy those facilities themselves. *Ibid.*

In determining that facilities used for backhauling do not qualify as "dedicated transport," the FCC stated in a footnote that its determination "effectively eliminates 'entrance facilities' as [unbundled network elements]" under Section 251(c)(3). *TRO*, 18 F.C.C.R. at 17,204 n.1116 (¶ 366 n.1116). The FCC reiterated, however, that "all telecommunications carriers * * * will have the ability * * * to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to [S]ection 251(c)(2)." *Id.* at 17,206 (¶ 368). The FCC thus indicated that interconnection facilities such as Facility A could qualify for the TELRIC rate under Section 251(c)(2), even if not under Section 251(c)(3).

b. Once again, the D.C. Circuit invalidated the FCC's effort to define "impairment." *See United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 594-595 (D.C. Cir.) (*USTA II*), cert. denied, 543 U.S. 925 (2004). The D.C. Circuit briefly addressed the competitors' argument that the FCC had erred in determining that "entrance facilities" were not part of an incumbent's network in the first

place (and thus could never be subject to TELRIC rates). See *id.* at 585-586. The court ultimately declined to rule on the merits of the FCC's determination, concluding that the record was "too obscure," and remanded the issue for further consideration. *Id.* at 586. The court added that, "[i]f entrance facilities are correctly classified as 'network elements,' an analysis of impairment would presumably follow." *Ibid.*

c. The FCC then issued a fourth set of rules on the "impairment" issue. See *In re Unbundled Access to Network Elements*, 20 F.C.C.R. 2,533 (2005) (*Triennial Review Remand Order* or *TRRO*). A short portion of those rules addressed the matter of "entrance facilities" that was previously covered in the *TRO* and *USTA II*. The FCC interpreted *USTA II* as holding that it had erred in excluding entrance facilities from the definition of "dedicated transport." *Id.* at 2,609-2,610 (¶ 136). The FCC therefore reinstated its prior view that "dedicated transport" included "entrance facilities"—and thus that those facilities could potentially qualify for the TELRIC rate under Section 251(c)(3). *Id.* at 2,610 (¶ 137).

Having concluded that "entrance facilities" were once again to be considered part of an incumbent's network, the FCC proceeded to determine whether the failure to provide access to those facilities would impair a competitor's ability to provide service, with the result that the facilities should be treated as unbundled network elements for purposes of Section 251(c)(3). *TRRO*, 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). The FCC ultimately found that there would not be impairment, heavily relying on the subsidiary economic findings it had made with respect to "backhaul facilities" in the *TRO* and supporting those findings with evidence it had subsequently received. *Id.* at 2,610-2,611 (¶¶ 138-139). At the same time, as in the *TRO*, the FCC reiterated that its finding

on impairment did not "alter the right of competitive LECs to obtain interconnection facilities pursuant to [S]ection 251(c)(2)"—and that such facilities were still available to competitors at TELRIC rates "to the extent that they require them to interconnect with the incumbent LEC's network." *Id.* at 2,611 (¶ 140).[5]

This time, the FCC's efforts were upheld in full. See *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). No party to that litigation challenged the FCC's determinations on "entrance facilities."

5. Following the *TRRO*, incumbents sought to revise the terms of their interconnection agreements with competitors, claiming that the *TRRO* entitled them to higher rates for facilities used for interconnection between their networks and those of competitors. Four federal courts of appeals have since reviewed decisions of state utility commissions on that question. Three of those courts held that, in determining in the *TRRO* that "entrance facilities" were not unbundled network elements, the FCC was referring only to facilities used for backhauling—and that facilities used for interconnection were subject to TELRIC rates under Section 251(c)(2). See *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071-1072 (7th Cir. 2008); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009); *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 843-847 (9th Cir. 2010). By contrast, notwithstanding an invited amicus brief from the FCC confirming that understanding, a divided Sixth Circuit held that incumbents could charge higher rates even for facilities used for in-

[5] The FCC codified its finding that "entrance facilities" were not unbundled network elements at 47 C.F.R. 51.319(e)(2)(i).

terconnection. See 10-313 Pet. App. 1a-33a; *id.* at 33a-45a (Sutton, J., dissenting).

SUMMARY OF ARGUMENT

Although the technology and regulatory scheme at issue in this case are relatively complicated, the legal question at its core is not. The court of appeals' decision disregarding the FCC's own interpretation of its regulations cannot be justified under settled principles of agency deference. In two orders, the FCC made clear that, while facilities used for backhauling did not constitute unbundled network elements subject to TELRIC rates under Section 251(c)(3) of the Telecommunications Act of 1996, facilities used for interconnection were subject to TELRIC rates under Section 251(c)(2). The FCC made clear in each order that facilities used for interconnection were excluded from its analysis under Section 251(c)(3); the FCC's references to "entrance facilities" in the later order were plainly directed at backhaul facilities, rather than both categories of facilities. The FCC confirmed that understanding in an amicus brief before the court of appeals, and there is no valid basis for refusing to defer to the FCC's interpretation here.

Affirmance of the court of appeals' decision, moreover, would have enormously adverse consequences for competition in the telecommunications industry. The court of appeals' approach would run counter to the objectives of the Telecommunications Act, because it would permit incumbents unilaterally to exact higher prices for facilities used for interconnection and thereby undermine the ability of competitors to obtain access or connect to the incumbents' customers at cost-based rates. For Sprint, the consequences of permitting incumbents to charge those higher prices are particularly severe, because its two largest competitors in the wireless market

also control a substantial portion of the Nation's local telephone network. If the court of appeals' decision is upheld, competition in the wireless market (and other markets across the telecommunications industry) will be undermined, and consumers disserved. This Court should reject the court of appeals' approach and hold that the FCC's interpretation is entitled to deference.

ARGUMENT

A. The Court Of Appeals' Decision Is Erroneous

The central question before the Court in this case is whether facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). In the decision under review, the Sixth Circuit held that incumbents could charge higher rates for those facilities. See 10-313 Pet. App. 1a-33a. That holding cannot be squared either with the FCC's findings concerning "entrance facilities" or with the FCC's own interpretation of its regulations.

1. a. In the *TRRO*, the FCC ultimately determined that "entrance facilities" should not be treated as unbundled network elements for purposes of Section 251(c)(3) of the Act. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). It is clear both from the *TRRO* and from the earlier *TRO*, however, that the FCC's determination applied only to facilities used for "backhauling" traffic from one component of a competitor's network to another (*e.g.*, Facility B in the examples discussed above), and not to facilities used to interconnect a competitor's network with the incumbent's (*e.g.*, Facility A).

In the *TRO*, the FCC expressly distinguished between those two types of facilities. With regard to a backhaul facility such as Facility B, the FCC determined that the facility not only did not qualify as an unbundled network element for purposes of Section 251(c)(3), but did not even qualify as a network element subject to the

"impairment" test for unbundling in the first place (because it did not constitute "dedicated transport"). See *TRO*, 18 F.C.C.R. at 17,203-17,204 (¶¶ 365-366). In the course of so determining, the FCC also signaled that, even if a backhaul facility did qualify as a network element subject to the "impairment" test, it would not qualify as an unbundled network element, because competitors would not be economically disadvantaged by supplying their own backhaul facilities (and thus would not be impaired if they could not access incumbent-supplied backhaul facilities at TELRIC rates). See *id.* at 17,204-17,205 (¶ 367). The exact reasoning for the FCC's determination, however, was irrelevant to the outcome: either way, backhaul facilities would not be subject to TELRIC rates under Section 251(c)(3). Critically for present purposes, the FCC made clear that its determination applied only to backhaul facilities such as Facility B and not to facilities used for interconnection such as Facility A, which were subject to TELRIC rates under Section 251(c)(2) regardless of whether there was impairment. See *id.* at 17,204, 17,206 (¶¶ 366, 368).

After the D.C. Circuit, in invalidating the *TRO*, cast doubt on the FCC's determination that backhaul facilities did not even qualify as network elements subject to the impairment test in the first place, the FCC expressly found in the *TRRO* (as it had signaled it would in the *TRO*) that those facilities would not qualify as unbundled network elements because there would not be impairment. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). To be sure, in the *TRRO*, the FCC did not expressly refer to "backhaul facilities" as often as it did in the *TRO*; instead, it primarily spoke of "entrance facilities." But in finding that there would not be impairment, the FCC relied on the subsidiary economic findings it had made with respect to "backhaul facilities" in the *TRO*. See *id.* at

2,610-2,611 (¶¶ 138-139). In the concluding paragraph of the relevant section, moreover, the FCC cited a paragraph of the *TRO* that expressly identified the backhauling function. See *id.* at 2,612 n.396 (¶ 141 n.396) (citing *TRO*, 18 F.C.C.R. at 17,204 (¶ 367)). And the FCC again made clear that its determination applied only to backhaul facilities and not to facilities used for interconnection, which were subject to TELRIC rates under Section 251(c)(2). See *id.* at 2,611 (¶ 140).

In short, aside from the FCC's retreat from its earlier position that backhaul facilities did not even qualify as network elements subject to the impairment test in the first place, there is no meaningful distinction between the FCC's positions in the *TRO* and the *TRRO*. In the *TRO*, the FCC expressly made economic findings concerning "backhaul facilities." And although the FCC was less explicit in the *TRRO* that its discussion pertained only to "backhaul facilities," there was no need for it to be as explicit as it had been in the *TRO*. As is relevant here, the D.C. Circuit had cast doubt on only one proposition from the *TRO*—that backhaul facilities were not subject to the impairment test in the first place. Accordingly, in the *TRRO*, the only adjustment that the FCC needed to make was to rescind that determination, and there was little reason for the FCC to do anything more than to reiterate the remainder of its findings from the *TRO* in relatively summary fashion. When read together, therefore, the FCC's orders make clear that, although facilities used for backhauling are not subject to TELRIC rates under Section 251(c)(3), facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2).

b. In its amicus brief before the court of appeals, the FCC confirmed the foregoing interpretation: *viz.*, that its determination for purposes of "unbundling" under

Section 251(c)(3) applies only to entrance facilities used for backhauling and that Section 251(c)(2) requires an incumbent to provide at TELRIC rates "facilities used for the physical linking of its network with the network of a competitive carrier." FCC C.A. Br. 20. An agency's interpretation of its own regulations is entitled to deference as long as it is not "plainly erroneous or inconsistent with the regulation[s]." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted), and such deference is amply warranted here.

As an initial matter, the most that can be said about the regulations and orders at issue is that they "do not give a definitive answer" to the question presented. *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2472-2473 (2009). In fact, as discussed above, the better view is that the FCC's orders themselves affirmatively indicate that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). The *TRO* states that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,' [S]ection 251 (c)(2) of the Act expressly provides for this." 18 F.C.C.R. at 17,204 (¶ 366) (first alteration in original). And it further states that "all telecommunications carriers * * * will have the ability * * * to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to [S]ection 251(c)(2)." *Id.* at 17,206 (¶ 368). For its part, the *TRRO* reiterates that its finding of no impairment does not "alter the right of competitive LECs to obtain interconnection facilities pursuant to [S]ection 251(c)(2)"—and that such facilities were still available to competitors at TELRIC rates "to the extent that they require them to interconnect with the incumbent LEC's network." 20 F.C.C.R. at 2,611 (¶ 140). In light of those statements (and the extended

discussion of "backhaul facilities" in the *TRO*), it certainly cannot be said that the FCC's regulations and orders unambiguously compel a contrary interpretation. Deference to the FCC's interpretation is therefore appropriate.[6]

There is no other valid basis for refusing to defer to the FCC's interpretation here. This is not a situation in which the regulation at issue simply "restate[s] the terms of the statute itself," such that an interpretation of the regulation is nothing more than an interpretation of the corresponding statutory provision. *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006). Nor is this a situation in which the agency's position is simply "a '*post hoc*' rationalization' advanced * * * to defend past agency action against attack," because the FCC is not a party to these proceedings and no party is challenging any of its orders. *Auer*, 519 U.S. at 462 (brackets omitted) (quoting *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988)). Although the FCC has expressed its position in an amicus brief, "[t]here is simply no reason to suspect that the interpretation does not reflect the [FCC's] fair and considered judgment on the matter in question." *Ibid.*[7] Nor is this a situation in which the

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[6] The FCC's regulation codifying its finding that "entrance facilities" are not unbundled network elements is not to the contrary. That regulation provides that "[a]n incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. 51.319(e)(2)(i). It does not speak to an incumbent's obligation to provide access to facilities for interconnection.

[7] As recently as earlier this Term, the Court has repeatedly deferred to an agency's interpretation of its own regulations even when they are stated in a legal brief. See, *e.g.*, *Chase Bank USA, N.A.* v. *McCoy*, No. 09-329, slip op. 12-16 (Jan. 24, 2011); *Kennedy* v.

agency has taken inconsistent positions on the interpretive question at issue; the FCC has consistently held the view that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). Cf. *Kennedy* v. *Plan Administrator for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 & n.7 (2009) (deferring to an agency position expressed in an amicus brief notwithstanding that the position "ha[d] fluctuated"); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (deferring to an agency position notwithstanding that the agency had "clearly struggled" with the relevant issue).

Given the notorious complexity both of the underlying technology and of the applicable legal regime, see, *e.g.*, *USTA I*, 290 F.3d at 421-422 (noting the "extraordinary complexity of the Commission's task" in defining "impairment"); *AT&T*, 525 U.S. at 397 (describing the Act as "a model of ambiguity or indeed even self-contradiction"), this is the archetypal case in which deference to the views of an expert agency is appropriate. See 10-313 Pet. App. 36a (Sutton, J., dissenting). And because the FCC's interpretation is a "sensible and rational construction" that is consistent with the regulations at issue, *Coeur Alaska*, 129 S. Ct. at 2474, 2477, it is entitled to deference.

2. By contrast, the court of appeals' contrary interpretation cannot be reconciled with the FCC's orders. In response to the FCC's repeated statements in the *TRO* and the *TRRO* that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2), respondent contends that those statements merely refer to "pre-existing rights" under that provision. Br. in Opp.

Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 872 & n.7 (2009); *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 328-329 (2008).

24. In respondent's view, a competitor's "right" to interconnection extends only to "non-network element equipment" such as "cross-connects" (*i.e.*, short cords that link two wires together), rather than "the entire facility spanning the distance between" a competitor's network and an incumbent's. *Id.* at 23; Resp. C.A. Br. 38-39 & n.22. Put another way, respondent defines an "interconnection facility" not as Facility A in its entirety, but rather as the very limited portion of Facility A between the point at which it enters the incumbent's tandem office and the point at which it interfaces with the incumbent's switch within that office.

That interpretation is critical to respondent's argument, for respondent is attempting to give some meaning to Section 251(c)(2)—as it must in light of the FCC's findings in the *TRO* and *TRRO*. But it is ultimately unpersuasive. To begin with, as the FCC noted in its amicus brief below, the FCC has "consistently found" that an incumbent "may be required to provide facilities that are used for the physical linking of the two networks" at TELRIC rates in order to fulfill its duty to interconnect under Section 251(c)(2), without suggesting that the incumbent can satisfy that obligation by providing only a portion of those facilities. FCC C.A. Br. 18. In fact, the FCC has indicated that an incumbent has an affirmative obligation to "build out * * * facilities" for interconnection under "meet point arrangements," *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,780-15,781 (¶¶ 551-553) (1996), and has underscored the statutory obligation to provide for collocation of equipment necessary for interconnection, 47 C.F.R. 51.321(b). Those affirmative obligations are entirely inconsistent with respondent's interpretation, under which an incumbent would have only a passive obligation to

provide the equivalent of a wall jack on the outside of its office for a competitor to plug in.

In addition, although respondent suggests that its interpretation reflects the "pre-existing" scope of Section 251(c)(2) before the *TRRO*, Br. in Opp. 24, no incumbent, to the best of Sprint's knowledge, has ever previously asserted that interpretation. And at least in the wake of the *TRO*, incumbents had every incentive to do so: if, as respondent now claims, TELRIC rates were available under Section 251(c)(2) only for the proverbial "last inch" of facilities used for interconnection, incumbents should have started making that argument as soon as the FCC determined in the *TRO* that at least some entrance facilities were not subject to TELRIC rates under Section 251(c)(3). But they do not appear to have done so. And to the extent respondent argues in the alternative that the *TRRO* somehow narrowed the extent to which competitors may obtain facilities for interconnection at TELRIC rates under Section 251(c)(2), one would expect the FCC to have specifically discussed such a narrowing, because, as Judge Sutton observed below, such a "novel analysis without comment" would be "surprising." 10-313 Pet. App. 38a-39a (dissenting opinion). The FCC did not address the issue, and there is therefore no reason to believe that the FCC suddenly adopted respondent's interpretation.

That interpretation, moreover, is affirmatively inconsistent with the FCC's findings in the *TRO*. In determining that certain facilities did not qualify as a network elements subject to the "impairment" test for unbundling, the FCC repeatedly discussed the economics of "backhaul facilities." *E.g.*, 18 F.C.C.R. at 17,204 (¶ 366). When the FCC distinguished those facilities from facilities that are used for interconnection under Section 251(c)(2), the FCC in no way suggested that TELRIC

rates would not be available under Section 251(c)(2) for the *entirety* of the latter facilities. See *id.* at 17,204, 17,206 (¶¶ 366, 368). Indeed, it may have been for that reason that incumbents do not appear to have asserted respondent's proposed interpretation in the wake of the *TRO*.

In the court of appeals, respondent sought to explain away the *TRO* by arguing that it "did not survive review in the D.C. Circuit." Resp. C.A. Br. 24. But that is a gross oversimplification: the D.C. Circuit did not opine on the scope of the interconnection duty under Section 251(c)(2), but merely cast doubt on the FCC's determination that "entrance facilities" did not qualify as network elements subject to the "impairment" test in the first place. See *USTA II*, 359 F.3d at 586. In response, the FCC simply reverted to its prior view that those facilities were subject to that test, but would not qualify as unbundled network elements because there would not be impairment —and, in so doing, relied on the same economic findings it had made in the *TRO* in the specific context of backhauling. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). Because the FCC consistently took the position in the *TRO* and the *TRRO* that facilities used for interconnection are subject to TELRIC rates in their entirety under Section 251(c)(2), respondent is in essence collaterally attacking the validity of those orders in this proceeding—which it is not permitted to do. See 28 U.S.C. 2342.

In short, because the court of appeals' interpretation cannot be reconciled with the FCC's orders and fails to afford sufficient deference to the FCC's interpretation of those orders, it should be rejected.

B. If Adopted By This Court, The Court Of Appeals' Approach Would Harm Competition In The Telecommunications Industry

A rule that exempts incumbent carriers from providing competitors with entrance facilities for interconnection at TELRIC rates would have profound and adverse consequences for competition in the telecommunications industry. If adopted by the Court, that rule would impose substantial costs on competitors, promote the inefficient use of resources, and work to the disadvantage of consumers who reap the benefits of competition and innovation in the industry. For that reason, too, the court of appeals' approach should be rejected.

1. As the Court will be aware, the overarching purpose of the Telecommunications Act of 1996 was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, preamble (1996). The Act's legislative history confirms that the Act was intended to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapid[] private sector deployment of advanced * * * technologies and services * * * by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

Interconnection at TELRIC rates, in turn, is one of the primary mechanisms by which the Act "uproot[s] the monopolies that traditional rate-based methods had perpetuated" and thereby "jump-start[s]" competition in the telecommunications industry. *Verizon*, 535 U.S. at 488. Congress recognized that it would not be sufficient simply to preempt regulatory barriers to entry; new entrants would also require the ability to reach the customers of

other networks. The interconnection requirement in Section 251(c)(2) allows a new entrant to compete without bearing the prohibitive cost of duplicating the whole array of facilities that constitute an incumbent's preexisting network (or the unregulated cost of obtaining access to an incumbent's customers, where the incumbent is willing to provide it). In essence, the interconnection requirement provides a new entrant with the ability to make calls to, and receive calls from, all of the consumers on the incumbent's network; an entrant with only a small network of its own can thereby sell telecommunications services that reach all consumers.

Permitting incumbents to charge higher rates than TELRIC rates for facilities used for interconnection would run counter to those legislative objectives. Thanks to their longstanding monopoly power, incumbents have built extensive networks that include ample facilities to which competitors can connect their networks. It is incongruous to suggest that, despite the seemingly undisputed existence of such incumbent-provided facilities, competitors should nevertheless either pay higher rates for those facilities or provide duplicate facilities of their own. It is equally difficult to maintain that the purposes of the Act are served by respondent's cramped interpretation of Section 251(c)(2), which would apply TELRIC rates only to the relatively low-cost, inconsequential facilities within an incumbent's office (*e.g.*, the "cross-connect"), instead of the entire facility connecting the two networks. To implement the Act's "novel ratesetting" approach only to the "last inch" of facilities used for interconnection would neuter legislation intended to be "radically unlike all previous statutes." *Verizon*, 535 U.S. at 489.

The difference between TELRIC and non-TELRIC rates, moreover, is substantial. Sprint recently con-

ducted a nine-State survey examining the relationship between TELRIC rates and non-TELRIC rates for facilities used for interconnection. For a T1 connection, non-TELRIC rates are 75% higher on average than TELRIC rates; for a T3 connection, non-TELRIC rates are 63% higher. Those figures belie the proposition that a competitive market exists for facilities used for interconnection with incumbents' networks. And the additional resources that competitors will have to devote to interconnection facilities if the court of appeals' decision is upheld would necessarily be diverted from the deployment of new services and technologies—in contravention of the Act's objective of "accelerat[ing] rapid[] private sector deployment of advanced telecommunications services." H.R. Conf. Rep. No. 458, *supra*, at 113.

2. The court of appeals' approach threatens to entrench the competitive advantages of incumbent carriers. Interconnection links two networks for the mutual exchange of traffic; it inheres to the benefit not only of the networks but of consumers, and thus enhances overall consumer welfare. See *Verizon*, 535 U.S. at 490 n.11 (noting that "any value [of a network] to customers would be exponentially increased with the interconnection of more users to the network"). Although both competitors and incumbents benefit from interconnection, however, they do not benefit equally; it remains in the economic interest of incumbents to inhibit or deny interconnectivity to competitors such as Sprint. Where a competitor has a smaller customer base, the incumbent can raise the price of facilities used for interconnection, knowing full well that the competitor must agree to that price or suffer a severe competitive disadvantage (because its customers will have a greater need to connect with the incumbent's more numerous customers than vice versa).

For Sprint, the consequences of unrestrained costs of interconnection are particularly severe. As both a provider of wireless telephone service and a wholesaler of local telephone service to cable companies, Sprint's dependence on interconnectivity is substantial. In addition, Sprint's two largest competitors in the wireless market, AT&T and Verizon, own a majority of the Nation's incumbent carriers—and therefore control access to a substantial portion of the Nation's local telephone network.[5] If the court of appeals' decision is upheld, AT&T and Verizon will have the ability to harm Sprint's standing in the wireless market by the unfettered raising of the cost of connecting to their local wireline customers.

Unlike those companies, Sprint lacks substantial legacy networks developed by historical monopolies. In order to compete, therefore, Sprint relies on the combination of interconnectivity and the deployment of new services and technologies. Sprint invests substantial resources in developing new products, improving service quality, and expanding the reach of its own network. If it can efficiently interconnect with incumbents' networks, Sprint can continue to devote resources to those efforts, to the benefit of its customers and consumer welfare more generally.

Congress's objective in the Telecommunications Act of 1996 was "not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers" and thereby "give aspiring competitors every possible incentive to enter [new] markets." *Verizon*, 535 U.S. at

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[5] Of the seven original "Baby Bells" that resulted from the AT&T breakup, AT&T has purchased four (including respondent) and Verizon has purchased two.

489. By ensuring that competitors such as Sprint can obtain access to facilities used for interconnection at TELRIC rates, the FCC's interpretation gives greatest measure to that objective, thereby fulfilling congressional intent. This Court should reverse the court of appeals' outlying decision and hold that the FCC's interpretation is entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
MAR 8 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN,

Respondent.

ORJIAKOR N. ISIOGU, COMMISSIONER, MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,

Petitioners,

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF UNITED STATES TELECOM ASSOCIATION AND NETWORK ENGINEERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The United States Telecom Association ("USTelecom") is a trade association representing companies offering a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet, and cable services. USTelecom's members range in diversity from large, publicly traded companies to small rural cooperatives. USTelecom has an interest in the correct interpretation of federal communications law and regulation, which interpretation should account for the technical realities that confront the industry. In carrying out its mission, USTelecom unites the industry to advocate on priority issues before all branches of federal and state government, including the judiciary. USTelecom has litigated or filed amicus briefs in many of the key cases interpreting and applying provisions of the Communications Act.

Also participating as *amici curiae* are four telecommunications network engineers ("Network Engineers"). Network Engineers collectively have more than 120 years of experience in the telecommunications industry. Although they are not presently employed by any incumbent local exchange carrier, these engineers have held management positions with, among others,

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1. Pursuant to Supreme Court Rule 37.6, *amici curiae* and their counsel drafted this brief. No party or counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.

AT&T, Bell Atlantic, BellSouth, Qwest Communications, SBC, Southwestern Bell Telephone, and Verizon. They have been responsible for the planning, engineering, and operating of telecommunications networks as well as regulatory compliance and support. They also have witnessed first-hand how pivotal technology can be to regulatory classifications, which drive technology development, network deployment, and business operations. A list of engineers and their qualifications is set forth in the appendix hereto.

The legal questions in this case are intertwined with technical issues about telecommunications networks – how they are constructed and how they operate. While multiple courts have grappled with these issues, with the exception of the United States Court of Appeals for the Sixth Circuit, they have not always done so with technical precision. A decision that resolves this case based on an imprecise – or worse, incorrect – understanding of the underlying technical issues could have far-reaching, harmful effects on the telecommunications industry and the consumers it serves. *Amici Curiae* USTelecom and the Network Engineers share an interest in ensuring that the Court fully appreciates these underlying technical issues, which are neither self-evident nor simple. They thus respectfully offer this brief in an attempt to make these network issues more understandable to the Court.

SUMMARY OF THE ARGUMENT

The Court is no stranger to the Telecommunications Act of 1996, having been called upon to interpret the statute on several occasions.[2] Nor is the technology underlying today's telecommunications networks alien to the Court.[3]

Nonetheless, the issue in this case – the proper regulatory treatment of "entrance facilities" under the Act – requires a more detailed understanding of telecommunications network architecture. Lower courts have struggled with the technical aspects of the questions before them, and unfortunately, the technical descriptions of entrance facilities and the network diagrams offered by the petitioners obscure some important technical issues. The purpose of this brief is to explain certain technical concepts, in order to provide a more complete and helpful description of entrance facilities and their use in telecommunications networks.[4]

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2. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467 (2002).

3. *See Verizon Commc'ns*, 535 U.S. at 490-91 (describing the "physical incarnation" of the local exchange market); *see also id.* at 541 (Breyer, J., dissenting in part) (offering an example of an incumbent local telephone company's major switching center "in downtown Chicago, from which cables and wires run through conduits or along poles to subsidiary switching equipment, other electronic equipment, and eventually to end-user equipment, such as telephone handsets, computer modems, or fax machines located in office buildings or private residences").

4. *Amici curiae* do this by reference to terms, concepts, and diagrams that have appeared or been discussed in this and other proceedings. The Network Engineers also provide practical

The brief also clarifies several important points that the petitioners and their *amici* in support misconstrue. Specifically, and notwithstanding their claims to the contrary, separate entrance facilities are not deployed for the purpose of exchanging traffic and backhauling. Likewise, backhaul does not merely involve the routing of traffic to and from a single carrier's customers; rather backhaul allows the placement of any kind of telephone call to any kind of customer. Finally, the deployment of entrance facilities, which can be miles in length, involves activities that are fundamentally different from the steps that an incumbent carrier must take to facilitate interconnection.

ARGUMENT

I. Introduction to the Local Telecommunications Network

A. Overview

As this Court correctly observed, the telecommunications network is analogous to a "transportation network for communications signals, radiating like a root system from a 'central office' (or several offices for larger areas) to individual telephones, faxes, and the like."[5] Each central office serves a wire center, which represents the local geographic territory of an incumbent local exchange carrier ("LEC").[6] Within

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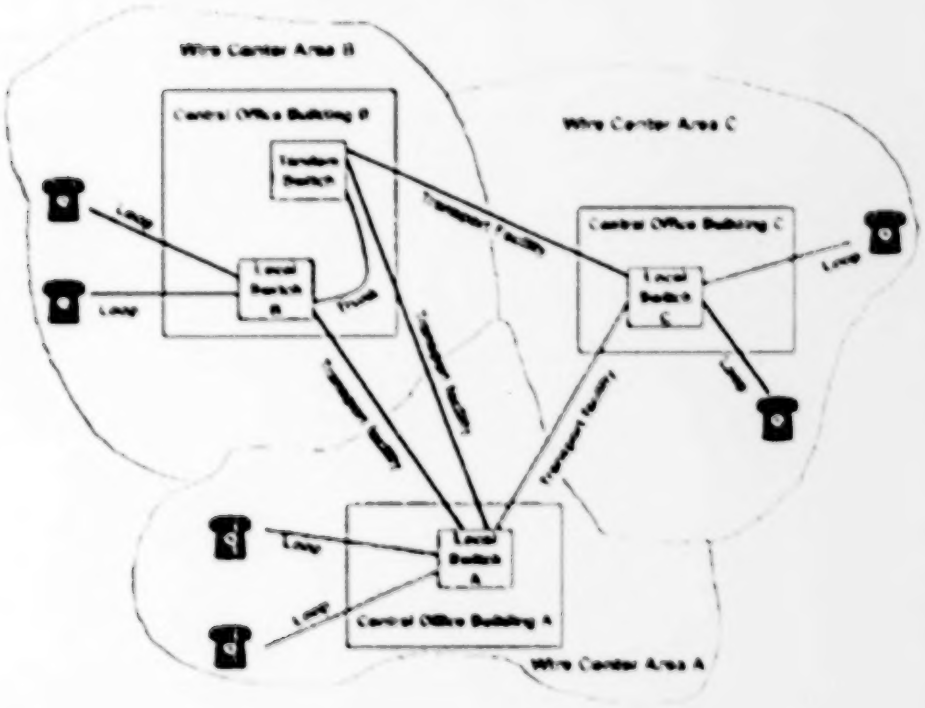
descriptions of various elements, practices and concepts based on industry standards and their professional experience.

5. *Verizon Commc'ns*, 535 U.S. at 491.

6. For example, the incumbent LEC or ILEC in the Washington, D.C. metropolitan area – Verizon – has approximately

each central office is the switching equipment, transport equipment, and cross-connect and power equipment used to serve the customers located within the wire center area. A local telephone customer obtains dial-tone on his or her telephone by means of a local loop connected to a local switch located in the wire center's central office.[7] All incumbent LEC customers located within the same wire center area have local loops connecting their homes or offices to the incumbent LEC's central office building serving that wire center area. Figure 1 is a diagram of an incumbent LEC's local telecommunications network.

FIGURE 1:
Incumbent Local Network



60 individual wire center areas in the Virginia, Maryland and Washington, D.C. area.

7. Each customer's "telephone number" resides on the local switch to which the customer's loop is connected.

Local Loop. In its simplest form, a local loop is physically a pair of wires running from the customer premises to the incumbent LEC's central office. A local loop may be made of copper wires (contained in a series of connected copper cables) for its entire length from the customer's premises to the central office. A local loop also may be a combination of copper wires and fiber optic strands. In this arrangement, copper wires connect the customer's premises to a digital loop transport (carrier) system that converts multiple copper lines (analog) into a digital format, combines (multiplexes) them together, and transports them to the central office over high capacity transport facilities, which typically consist of fiber optic cables.[8]

Local Switch. The local switch (also referred to as an end office switch) provides dial-tone to the customer's telephone using a loop facility (*i.e.*, dial-tone loop). It also provides various calling features such as three-way calling, call forwarding, and call waiting. The local switch interprets the digits dialed by the customer and makes call connections to other customers served by that same switch. Local switches are connected by interoffice circuits referred to as "trunks" that allow telephone calls to be completed to and from customers in different wire centers and served by different central offices.[9]

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8. *See, e.g.*, Telcordia Notes on the Networks, Telcordia Technologies Special Report, SR-2275, Issue 4, §§ 12.1.1, 12.1.3, 12.6 & 12.7 (Oct. 2000) ("*Telcordia Notes*"). Alternatively, a local loop may consist entirely of fiber optic strands, an arrangement often referred to as "fiber-to-the-home."

9. *See, e.g.*, *id.*, § 4.1.3.1. The function of completing calls to and from customers served by other switches is referred to as "routing" or "call routing."

Trunk. A trunk is a circuit that connects two switches. A switch makes the connections between the loops and trunks that it serves. For example, in Figure 1, for a call from a customer in wire center A to a customer in wire center B, the local switch in wire center A would establish a connection from the originating dial-tone loop to a trunk connecting local switch A to local switch B; the switch in wire center B would complete the call connection by connecting the incoming trunk from local switch A, to the dial-tone loop of the customer served by local switch B. A single trunk is used for one phone call for the duration of that call. When the telephone call is concluded, the trunk is released for use for the next call from a customer served by local switch A to a customer served by local switch B. For a telephone call between two customers served by the same local switch, no interoffice trunk is used.[10]

Tandem Switch. A tandem switch is a "specialty" switch that only makes connections between trunks and other switches. A tandem switch does not directly serve customers who originate or terminate calls. Instead, the tandem switch handles the intermediary function of connecting trunks carrying calls originated and terminated in other switches. In Figure 1, a tandem switch is shown located in Central Office B. In a local calling area with many local switches, a local switch may not have trunk connections directly to all the other local switches because low traffic volumes do not justify such direct connections. In this situation, a tandem switch is used for completing calls when direct trunks between a specific pair of switches do not exist. For example, in Figure 1, there are no direct trunks between local switch B and local switch C. In this case, a phone call from a

10. *See, e.g., id.*, §§ 4131, 4137 & 7214.

customer served by local switch B to a customer served by local switch C would be made using a trunk from local switch B to the tandem switch. The tandem switch would complete the connection (call path) between its trunk from local switch B and its trunk to local switch C and the customer served by local switch C. Additionally, tandem switches are also used for alternate call completion paths between a pair of switches if the direct trunks between that pair of switches are all temporarily busy (that is, are in use for other calls).[11]

Trunk Group. A trunk group is a homogenous quantity of trunks (typically in building blocks of 24 trunks) between two specific switches that are configured to operate together. For example, a trunk group of 96 trunks between two local switches would be capable of handling up to 96 simultaneous voice telephone calls between customers served by those switches. In an incumbent LEC's local network, particularly between a local switch and a tandem switch, the network may be configured with more than one trunk group between the same pair of switches. When this occurs, the different trunk groups are typically set up to carry different types of calls. For example, one trunk group would be used only for local calls, while the other trunk would be used only for long distance calls.[12]

Signaling Equipment. Generally speaking, signaling is the exchange of control information (dialed digits, customer billing numbers, and the like) used to set up and take down calls between switching systems. Older vintages

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11. *See, e.g., id.* § 4.1.3.3

12. *See, e.g., id.* § 4.1.3.1.

of signaling used the same circuit that would ultimately carry the call to convey signaling information. Modern switching systems use a signaling system (typically Signaling System 7 or "SS7") in which the signaling information is conveyed in separate pathways from the voice traffic. With SS7, also referred to as Common Channel Signaling ("CCS"), signaling information is conveyed without first using the trunk over which the call will be placed, which increases performance, reduces costs, and facilitates various calling services.[13]

B. Interconnection of Telecommunications Networks

Customers served by different telecommunications carriers cannot place telephone calls to one another unless the networks of the carriers serving those customers are interconnected. Interconnection is the physical linking of two carriers' networks for the mutual exchange of traffic (that is, telephone calls).[14] Historically, carriers were under no legal obligation to interconnect their networks.[15] However, beginning in 1970, relying upon its authority granted under the Communications Act, the Federal Communications Commission steadily expanded the

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13. *See, e.g., id.*, § 6.2.3.

14. First Report and Order, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,590, ¶ 176 (1996) ("*Local Competition Order*").

15. *See, e.g., Home Tel. Co. v. People's Tel. & Tel. Co.*, 141 S.W. 845, 848 (Tenn. 1911) (noting that, while telephone and telegraph companies are common carriers, "this does not mean that a telephone company is bound to permit another telephone company to make a physical connection with its lines").

interconnection obligation for various services, including long distance and wireless.[16]

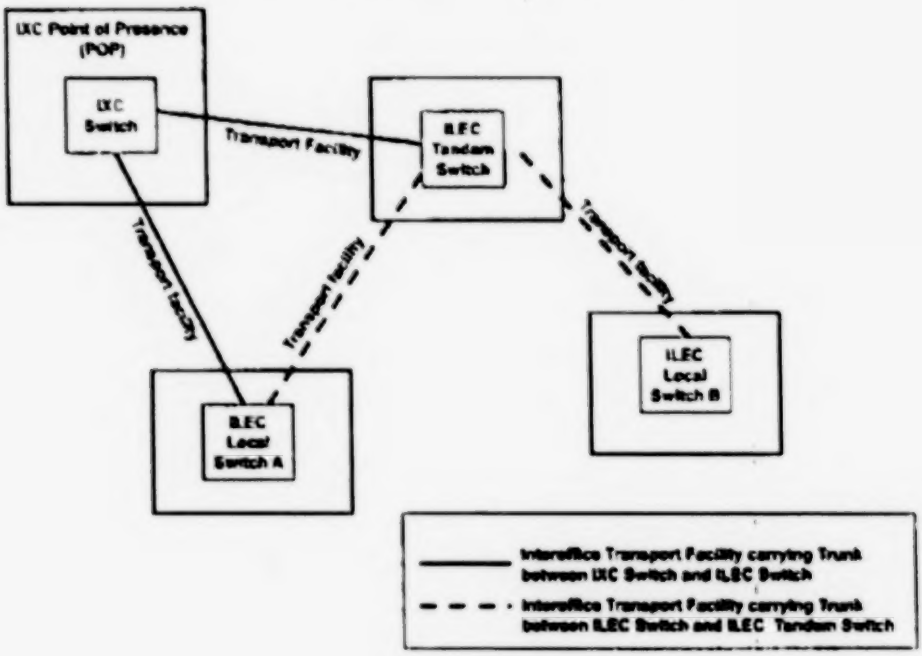
Before the advent of competition in the local exchange market, incumbent LECs' local networks were interconnected to the networks of long distance carriers or interexchange carriers ("IXCs"), which permitted the origination and termination of long distance calls to and from the incumbent LEC's local customers. Long distance carriers operate what is called a Point of Presence ("POP"), which is analogous to the incumbent LEC's central office. A long distance carrier's POP may contain both the physical switching and transport equipment owned by the carrier, or may only contain transport equipment that is connected to the long distance carrier's switch that physically resides in a different (distant) location.[17] Interconnection with a long distance carrier's switch is accomplished by building trunk groups from

16. *See, e.g.*, Notice of Inquiry to Formulate Policy, Notice of Proposed Rulemaking and Order, *Establishment of Policies and Procedures for Consideration of Applications To Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules*, 24 F.C.C.2d 318, 347, ¶ 67 (1970) ("If access to local facilities is requested and needed by the applicants, we would expect the local carrier . . . to permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers."); Decision, *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 422, ¶ 16 (1974), *aff'd sub nom. Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974); Report and Order, *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, 496, ¶¶ 55, 57 (1981).

17. *See, e.g., Telcordia Notes*, § 4.1.4.

that switch to the incumbent LEC's tandem switch and, if a long distance carrier so chooses, from the switch to one or more of the incumbent's local (end office) switches. Figure 2 is a diagram of direct interconnection between an incumbent LEC's local network and the network of a long distance carrier.[18]

FIGURE 2:
ILEC Interconnection with Interexchange Carrier (IXC)



18. As depicted in Figure 2, the IXC has trunks riding on the transport facilities to the incumbent's tandem switch as well as trunks to the incumbent's local switch A but no direct trunks to the incumbent's local switch B. In this arrangement, long distance calls to or from the incumbent's customers served by local switch B would only be sent (routed) to the long distance carrier through the incumbent's tandem switch. An IXC typically has trunks to each incumbent's tandem switch in each LATA (Local Access and Transport Area), which are geographic areas created by the

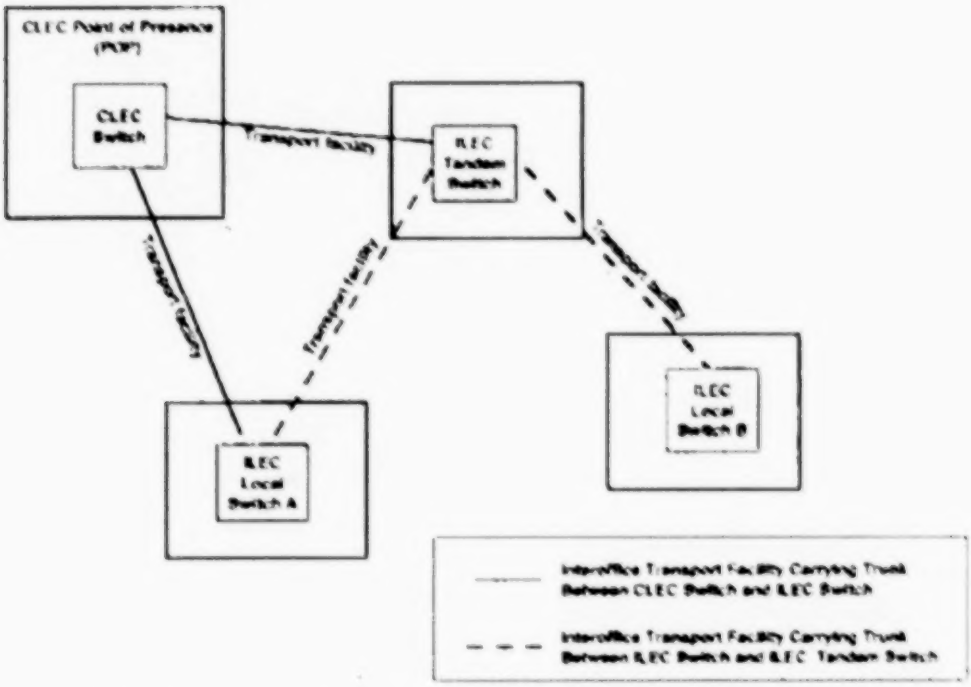
With enactment of the 1996 Act, and the opening of the local market to competition, competitive local exchange carriers (also referred to as competing LECs or "CLECs") were given the right to interconnect their networks with the incumbents' networks.[19] As is the case with long distance carriers, a competing LEC operates a POP that may contain its physical switching and transport equipment or just transport equipment that is connected to the competing LEC's switch physically residing elsewhere. The technical arrangements used to accomplish interconnection between a competing LEC's switch and the incumbent's central office are very similar to the technical arrangements used to interconnect a long distance carrier's switch and the incumbent's central offices. Figure 3 is a diagram of direct interconnection between an incumbent LEC's local network and the network of a competing LEC.[20]

Modification of Final Judgment. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. W. Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983). However, depending upon call volume and other factors, the IXC could choose to have direct trunks to some, all, or none of the incumbent's local switches in a LATA.

19. *See* 47 U.S.C. §§ 251(a), 251(c)(2). The use of the term "CLEC" in this context also includes providers of Commercial Mobile Radio Service ("CMRS"). *See Local Competition Order* at 16,000, ¶ 1015.

20. Under 47 U.S.C. § 251(a), a competitor has the option to interconnect "indirectly" with an incumbent LEC. When two carriers interconnect indirectly, there is no immediate physical connection between their networks. Rather, each carrier's network is connected to the network of a third carrier that serves as an intermediary between the originating and terminating carriers.

FIGURE 3:
ILEC Interconnection with Competitive Local Exchange Carrier (CLEC)



The location that represents the actual point where the network of one carrier (for example, a competing LEC) is physically connected to the network of another carrier (for example, an incumbent LEC) is called the point of interconnection ("POI").[21] FCC rules implementing the 1996 Act provide that each carrier is responsible for maintaining and operating the physical facilities and equipment on its respective "side" of the POI.[22] At the POI, connections generally referred to as "cross-connects" are made to physically link the networks. Cross-connects may be made between copper wires owned by the competing

21. *See, e.g., MCImetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 875 (4th Cir. 2003).

22. *See* 47 C.F.R. § 51.701.

LEC to copper wires owned by the incumbent, or between a coaxial cable owned by the competing LEC to a coaxial cable owned by the incumbent, or between a fiber optic strand owned by the competing LEC to a fiber optic strand owned by the incumbent. The different possible physical media (copper wire, coaxial cable, or fiber optic cable) are a function of the speed and nature (e.g., analog format or digital format) of the signals transmitted over the particular medium. Typically, the POI and the necessary cross-connect hardware equipment needed to make the physical connections are located inside the incumbent's central office.

C. Digital Transport Systems and Fiber Optics

Beginning with Alexander Graham Bell, a telephone call was transmitted as a continuously modulated (analog) electrical signal over a pair of copper wires. With the advent of digital technology, it became more cost effective to convert analog signals to digital signals (a stream of 0's and 1's), combine the digital signals from a number of analog lines, and transport the combined digital signals over a greater distance. At the distant end, the digital signals are uncombined and converted back into individual analog signals, at which point each individual call would typically travel over a single pair of copper wires to be completed.

The electronic equipment that converts signals from analog format to digital format and combines and uncombines the digital signals is called a multiplexer (often referred to as a "mux"). A digital transport system typically includes a pair of multiplexers (each located at different, distant locations) connected and dedicated to each other. The digital transport system transmits

combined digital signals between the pair of connected multiplexers, as the individual analog signals enter and exit the multiplexers at each end.

In North America, standards evolved such that the analog signal for one voice grade telephone call is converted into a digital signal operating at a speed of approximately 64,000 bits/second. This 64 kilobits per second (64 kbps) signal is referred to as a Digital Signal – Level 0 ("DS-0") signal. A related "digital hierarchy" was developed to standardize the digital building blocks for combining and uncombining digital signals. In this hierarchy, the signals for 24 analog lines (or 24 telephone calls, or 24 DS-0s), are combined into a single digital signal called a DS-1. The speed (bandwidth) for a DS-1 is approximately 1.5 megabits/second. The standard for the next step – the combining of DS-1s – is a DS-3. A DS-3 accommodates 28 DS-1 signals multiplexed together. The speed (bandwidth) for a DS-3 is approximately 45 megabits/second. A single DS-3 can carry 28 DS-1s, or 672 simultaneous telephone lines/calls (*i.e.*, 24 x 28). DS-1 and DS-3 digital circuits (as well as larger capacity circuits) are often referred to as "pipes," since they carry multiple digital signals.

Starting in the 1980s, incumbents began deploying digital transport systems over fiber optic facilities and continued to do so extensively, as the technological capacity and capabilities of these systems expanded dramatically. A Fiber Optic Transport System is made up of fiber optic multiplexers (sometimes referred to as fiber optic terminals) connected together by glass fiber optic strands. In an incumbent LEC's local network, fiber optic cables (containing the fiber optic strands) are deployed both in the loop portion of the network, as well as in the interoffice network, where the fiber optic

cables run between the incumbent LEC's central office buildings. In a broad sense, fiber optic multiplexers are similar to the early digital multiplexers. Lower speed (capacity) electrical and optical digital signals enter the fiber optic multiplexer, are combined into a higher speed (higher capacity) digital fiber optic signal, which is then transmitted as a high speed digital light (optical) signal between the fiber optic multiplexers connected together in the Fiber Optic Transport System. At each fiber optic multiplexer location, lower speed electrical and optical signals may be combined or uncombined as they enter or exit the Fiber Optic Transport System.

Synchronous Optical Network or "SONET" standards refer to a set of standards developed for the interoperability of different Fiber Optic Transport Systems. SONET standards include an "optical digital hierarchy" standardizing the building blocks for combining and uncombining optical circuits. In the SONET hierarchy, an OC-1 (Optical Channel 1) digital optical circuit is roughly equivalent to a DS-3 digital electrical circuit. Further steps in the optical hierarchy are the OC-3, OC-12, OC-48, etc. Using these building blocks, an OC-48 SONET Fiber Optic Transport System, for example, operating at an overall digital signal speed of about 2.5 gigabits per second, would carry the capacity of 48 DS-3s between the fiber optic multiplexers in the system, or the equivalent of 32,256 simultaneous analog telephone calls/lines.[23]

Because of the standard building blocks for combining and uncombining electrical and optical digital signals, and its extremely large capacity, a Fiber Optic Transport System usually carries an aggregation of numerous

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23. *See, e.g., Telcordia Notes*, § 14.15.

individual circuits from a large number of different origination and termination points. Typically, a Fiber Optic Transport System simultaneously carries trunks to various carrier switches (incumbent, competing, and long distance carriers) and a variety of non-switched point-to-point circuits (for example, circuits for non-switched DS-1 and DS-3 services). In a sense, the Fiber Optic Transport System is like a large multi-lane interstate highway, with the circuits (pipes) on that system representing lanes on the highway that carry a wide variety of types and sizes of traffic; multiplexers are analogous to the interchanges where varied traffic smoothly enters and exits the high capacity system.

In the incumbent's local network, interoffice Fiber Optic Transport Systems are configured between central office buildings using a number of different physical architectures. These architectures may include rings, point-to-point, and hub and spoke configurations. Consequently, an individual DS-1 or DS-3 interoffice circuit may traverse multiple Fiber Optic Transport Systems between the circuit's origination point and its termination point.[24] For example, in Figure 1, a DS-1 trunk group between local switch A and local switch C may be transported first over a fiber optic system using glass strands in a fiber optic cable running from central office A to central office B, and then over another fiber optic system using glass strands in a fiber cable running from central office B to central office C. Back to the interstate highway analogy, this would be like driving on I-495 and then I-395 to go from Northern Virginia to downtown Washington DC.

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24. *See, e.g.*, *id.*, § 14.15.3.1-6.

D. Entrance Facilities

An entrance facility is a dedicated fiber optic transport system connecting a competing LEC's POP to an incumbent's central office.[25] An entrance facility consists of a fiber optic cable containing fiber strands that extends between the competing LEC's POP and the incumbent's central office and connects to a pair of SONET fiber optic multiplexers, one located at the competing LEC's POP and the other inside the incumbent's central office.

In essence, an entrance facility is the first (or last) transport link for numerous and various longer circuits running from the competing LEC's POP. The entrance facility aggregates together and transports these different individual circuits between the competing LEC's POP and the incumbent's central office. The entrance facility typically terminates at a location in the incumbent's central office that allows circuits riding the entrance facility to fan out to different destinations (end points) throughout the incumbent's local network. As a result, an entrance facility will frequently carry trunks bound for different incumbent local switches, trunks to other carrier switches, as well as various non-switched circuits – all across the same dedicated transport system. Figure 4 is a diagram of typical competing LEC entrance facility.

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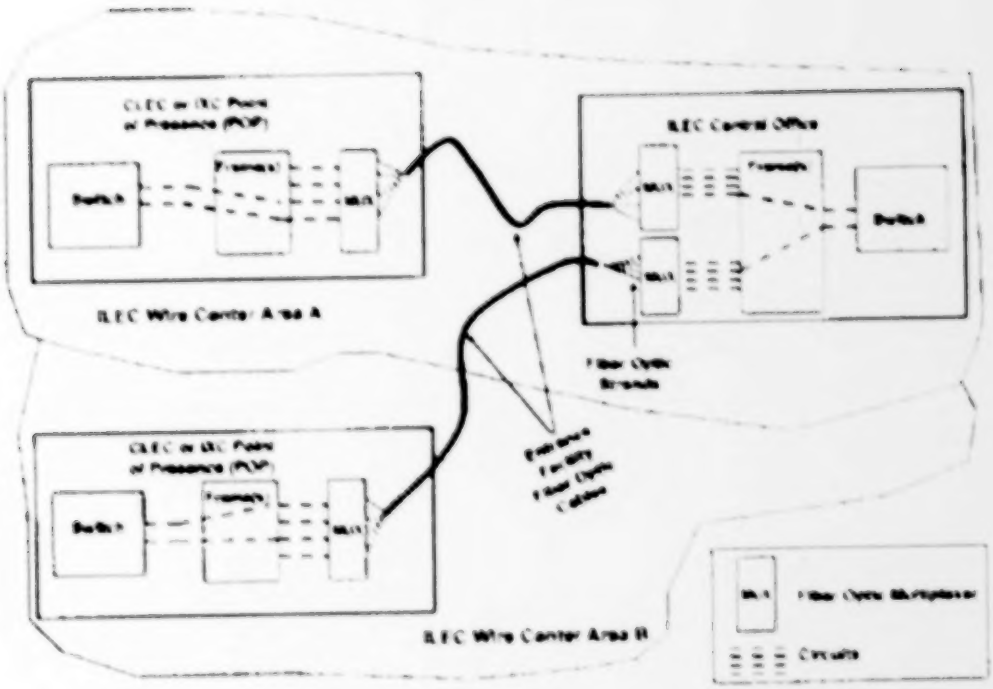
25. Long distance carriers also use entrance facilities to connect to an incumbent LEC's central office and entrance facilities may be used to connect buildings or office campuses, but this discussion focuses on the use of entrance facilities by competing LECs given the issues before the Court. *See* 47 C.F.R. § 69.2(qq) (defining "entrance facilities" as "transport from the interexchange carrier or other person's point of demarcation to the serving wire center").

FIGURE 4:
Entrance Facility



The length of an entrance facility can vary considerably and is a function of the location of the POP where the competing LEC has elected to place its equipment relative to the incumbent's central office. Generally, most entrance facilities are less than five miles in length, although some can be considerably longer. Where the incumbent's central office and competing LEC's POP are located in close proximity, an entrance facility can be less than the length of a single city block.

As a point of reference, Figures 5 and 6 are maps of the Atlanta, Georgia metropolitan area and the Atlanta

downtown sector, respectively.[26] These maps depict the location of AT&T's central office on Courtland Street in Atlanta (where AT&T is the incumbent) as well as the location of various competing LEC switches. Because the Courtland Street central office is located in the downtown Atlanta business district, many competing LECs connect their switches to the Courtland Street central office. As reflected on Figures 5 and 6, the length of an entrance facility necessary to connect each of the competing LEC's switches to the Courtland Street central office could vary from almost one city block to nearly 18 miles.[27]

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26 Figures 5 and 6 were prepared by GeoResults, a national telecommunications database marketing and consulting firm. GeoResults maintains the GeoSwitch™ Database, which is a national listing of all building locations that it has identified as having one or more wireline telecommunications switches. Figures 5 and 6 do not include switches of CMRS providers in the Atlanta area.

27 One competing LEC's switch is collocated in AT&T's Courtland Street central office. Collocation, which is a method of interconnection, does not require ILEC-provided entrance facilities. In addition, for those competing LEC switches located in the outlying locations from downtown Atlanta, the competing LEC may elect to use entrance facilities to connect to the nearest AT&T central office and rely upon AT&T's interoffice transport to reach from that central office to AT&T's Courtland Street central office.

FIGURE 5:
CLEC Switch Locations — Metro Atlanta

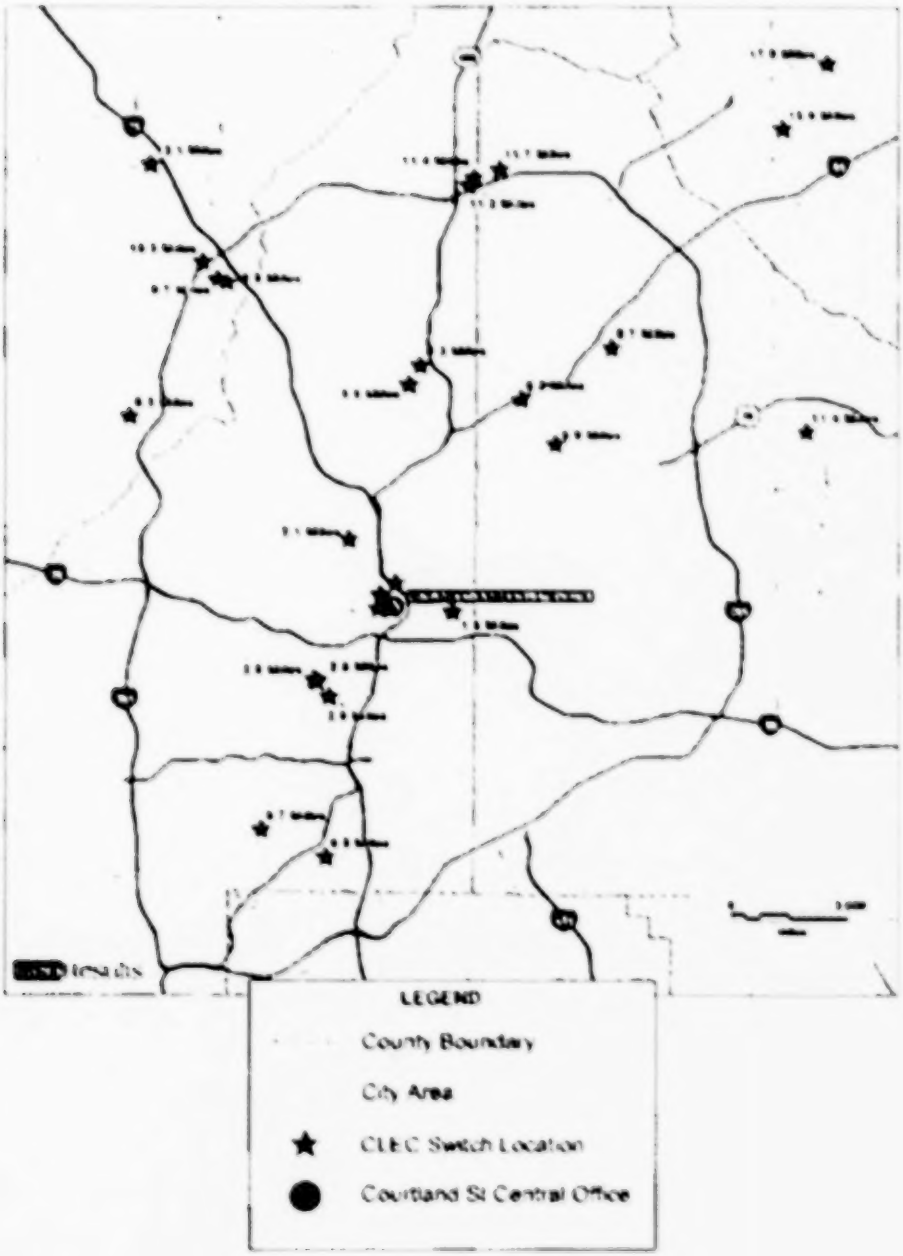
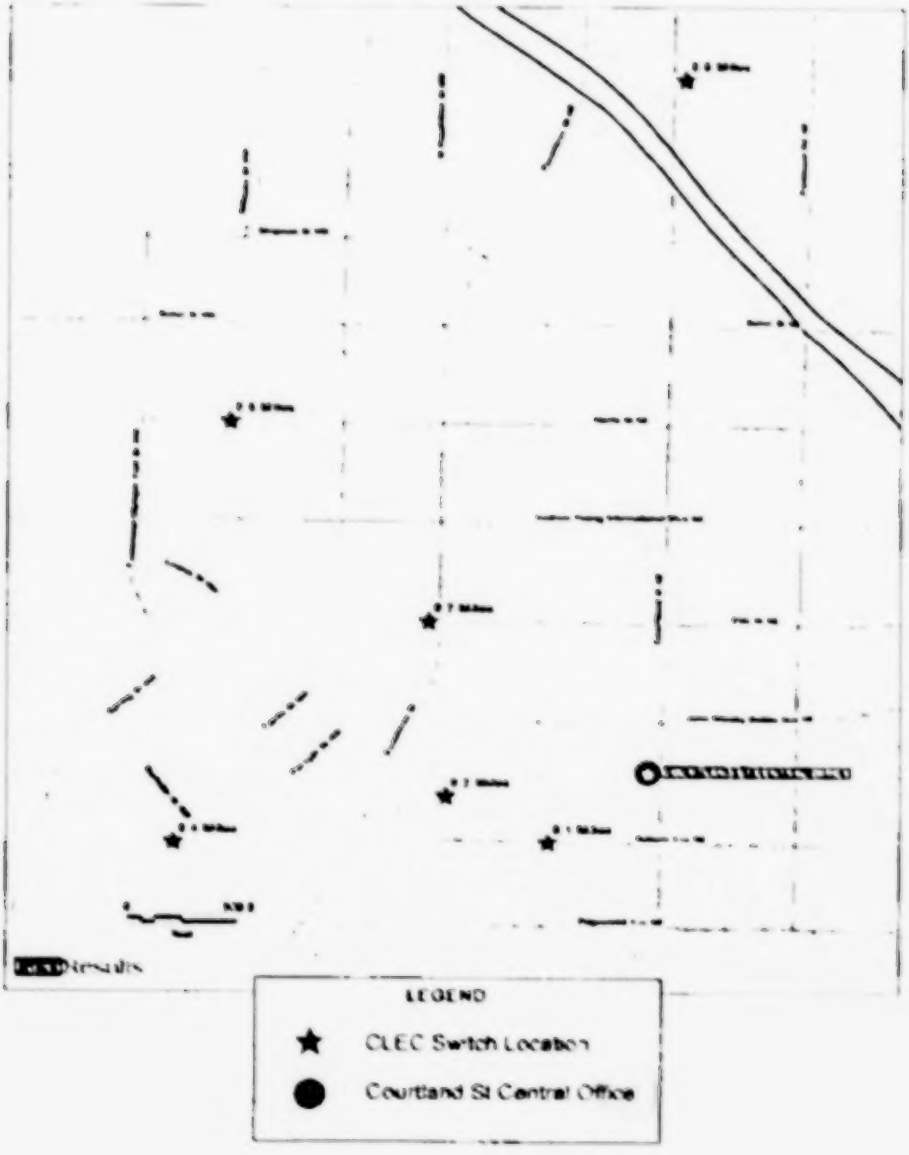


FIGURE 6:
CLEC Switch Locations — Downtown Atlanta



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A competing LEC can construct entrance facilities itself or obtain them from the incumbent or a third party.[28] The construction of new entrance facilities where such facilities do not presently exist is a costly and time-consuming exercise, whether the construction is done by the CLEC, the ILEC, or a third party. For example, one incumbent LEC's typical interval for deploying new entrance facilities is 120 business days, provided that the incumbent has fiber optic cables already located near the competing LEC's POP. Even longer intervals are involved if significant additional fiber cable construction is required.

Although not exhaustive, the following work activities generally are required when the incumbent deploys a new entrance facility (some of which are performed by the competitor): (i) preparing environmental building space at the competing LEC's POP; (ii) placing or expanding cross-connect equipment at the competing LEC's POP, which may include additional cable or equipment racking and riser cable facilities; (iii) installing and constructing power equipment and power connections to operate the multiplexer at the competing LEC's POP; (iv) designing and engineering the Fiber Optic Transport System based on a service forecast provided by the competing LEC; (v) constructing the fiber transport system from the incumbent's central office to the competing LEC's POP, which may require obtaining various permits to the extent that work in the public rights of way is required;

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28. *See* Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533, 2610, ¶138 (2005) ("*Triennial Review Remand Order*").

(vi) ordering fiber optic multiplexers from the equipment vendor; (vii) installing the fiber optic multiplexers after delivery; (viii) splicing the fiber optic cable segments from the incumbent's central office to a location near the competing LEC's POP; (ix) splicing or placing fiber optic cables into the competing LEC's POP; (x) placing and splicing intra-building fiber optic cables by the incumbent within the competing LEC's POP to reach the exact location of the fiber optic multiplexer; (xi) testing and turning up both fiber optic multiplexers (in the incumbent central office and the competing LEC's POP) as a single system; and (xii) installing alarm and monitoring circuits to the system (for remote surveillance and operations).

Some of these activities may be performed in parallel, although a number of them must be performed sequentially.[29] The same activities are required if the competing LEC or a third party is deploying the new entrance facility.

Once construction of a new entrance facility is complete, additional work would be required to install the various individual circuits that are transported across the entrance facility. For example, a competing LEC could order from the incumbent DS-3 and DS-1 transport circuits for service and the trunks that ride on those DS-3 and DS-1 circuits. Upon receipt of these service orders, the incumbent would place additional electronic equipment

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29. For example, fiber optic multiplexers cannot be activated and tested until a complete fiber optic path is constructed from the competing LEC's POP to the incumbent's central office, and fiber optic multiplexers cannot be installed in the competing LEC's POP until HVAC, structural loads, fire suppression, electrical bonding and grounding, floor space, and power is available.

on either end of the entrance facility in order to activate the required circuits and trunks.

An entrance facility is not the only method to provide the "transport link" between a competing LEC's POP and an incumbent's central office. Another method is meet point interconnection, which involves both the competing LEC and the incumbent LEC building their own fiber optic cables to an intermediate location between the competing LEC's POP and the incumbent's central office. Fiber strands from the competing LEC's fiber optic cable are connected to fiber strands from the incumbent's fiber optic cable at this intermediate location. Both the competitor and incumbent bear their own costs of deploying the fiber optic cables (and the strands therein) on their respective side of the intermediate location and the fiber multiplexer located at their respective end of the fiber optic transport system. The meet point fiber optic transport system is then operated jointly by the competitor and the incumbent.[30]

E. Backhaul

The need for backhaul typically arises when a competitor leases an unbundled loop from the incumbent but provides the customer served by that loop with dial tone from the competitor's switch located elsewhere. Backhaul occurs when a competitor's customer's dial-tone line connection (that is, the circuit from the customer's premises to the competitor's switch) is transported across

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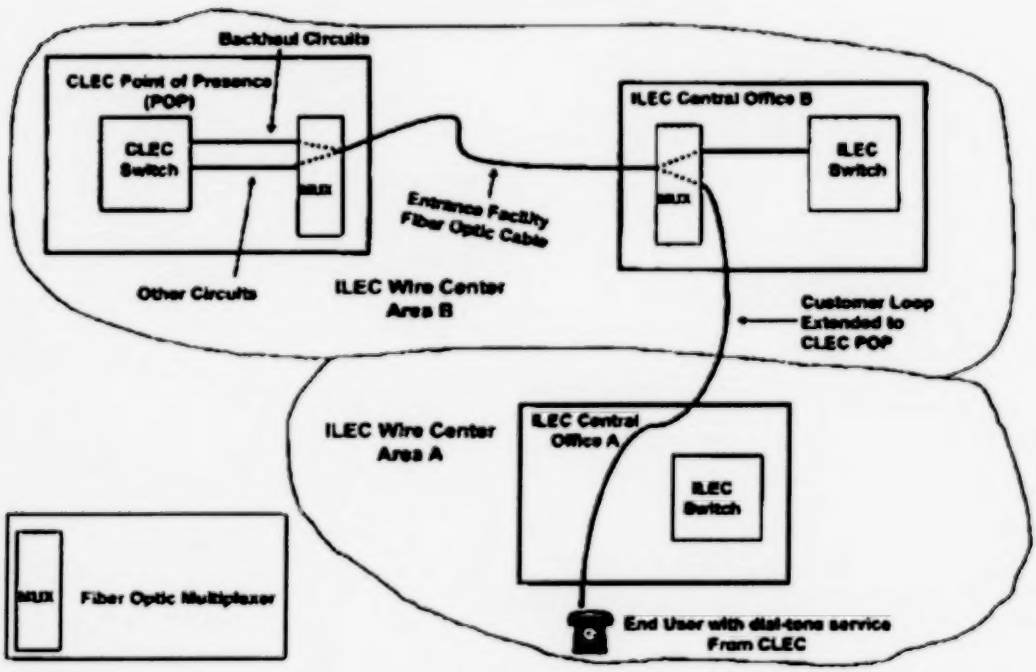
30. According to the FCC, unless the parties agree otherwise, the point of interconnection in a meet point arrangement is a point inside the incumbent's central office – such as on the incumbent's "main distribution frame" or "trunk-side of the switch." *Local Competition Order* at 15,781, ¶ 553.

an entrance facility connecting the incumbent's central office to the competitor's POP. Figure 7 is a diagram of typical backhaul arrangement.

FIGURE 7:
Backhaul Arrangement



In Figure 7 the competitor's customer is located in the incumbent's wire center A. The competitor's switch that provides dial tone to this customer is located in its POP, which is in incumbent wire center area B. The competitor's customer's dial-tone line connection from the customer's premises to the competitor's switch runs through the incumbent's central office A, to the incumbent's central office B, where it is connected in the incumbent's central office B to the entrance facility running from the incumbent's central office B to the competitor's POP.

What distinguishes Figure 7 as a backhaul arrangement is that the competitor's customer's dial-tone line connection is transported across the entrance facility from the incumbent's central office B to the competitor's switch located in its POP. The entrance facility that provides the "backhaul link" for the competitor's dial-tone customer in wire center area A is the same Fiber Optic Transport System (i.e., the same fiber multiplexers and fiber cables) that also transports trunks from the competitor's switch to the incumbent's switches, transports trunks from the competitor's switch to the switches of other carriers, and transports non-switched circuits to and from the competitor. All of these circuits and services are aggregated together across the same entrance facility.

II. Clarification of Network Issues

Against this technical backdrop, the petitioners and their *amici* in support misconstrue several important points regarding entrance facilities. The same is true of those appellate courts that have held that incumbents must provide entrance facilities under 47 U.S.C. § 251(c)(2).

A. Separate entrance facilities are not deployed for the exchange of traffic and backhaul purposes.

In their filings and as reflected in diagrams submitted with or referenced in their briefs, the petitioners erroneously suggest that different entrance facilities exist to accommodate separately interconnection and

backhaul.[31] From a network engineering (and cost) standpoint, the same fiber optic cable that contains the fiber strands and the pair of multiplexers comprising the entrance facility is installed and used for both interconnection and backhaul. The same fiber cable and multiplexer pair that transport trunks to and from various carrier switches (interconnection) also would transport competing LEC customers' dial-tone line connections across the entrance facility (backhaul). Given the time and expense of deployment, it is almost inconceivable from a network design (and cost) standpoint that an entrance facility would ever be deployed "solely for backhauling."[32]

That the same entrance facility is used both for interconnection and backhaul underscores a pricing problem that neither the petitioners nor their supporting *amici* address. That is, under their view, an incumbent LEC would be required to provide an entrance facility to a competing LEC at rates established under the Total Element Long Run Incremental Cost (TELRIC) methodology when the CLEC ostensibly seeks to use the entrance facility for interconnection purposes. However, once the incumbent has designed, engineered, and constructed the fiber transport system and installed and

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31. *See, e.g.*, Michigan Public Service Commission Br. at 23 (providing a diagram that depicts two separate entrance facilities, one for backhaul and the other for interconnection); California Public Utilities Commission Br., Appendix 1 (same); Talk America Br. at 26.

32. Michigan Public Service Commission Br. at 21; *see also* COMPTEL Br. at 16 (claiming that "the CLEC is entitled to TELRIC pricing" when the entrance facility is "used for the transmission and routing" of traffic "between the ILEC and the CLEC" but not when that facility is used for backhauling).

activated the fiber optic multiplexers, the competing LEC could readily establish circuits for backhaul purposes that would ride that same TELRIC-priced entrance facility. Thus, while readily acknowledging that competing LECs should not be able to obtain an entrance facility at TELRIC when used for backhaul, the petitioners and their supporting *amici* ignore that this would be the inevitable result if the Court were to agree with their position in this case.

It is no answer to argue, as the California Public Utilities Commission erroneously does, that an incumbent can prevent, on a call-by-call basis, the use of an entrance facility for backhaul purposes.[33] An incumbent has no such capability. Calls made by competing LEC's customers whose dial-tone line connections to its switch are backhauled across an entrance facility never touch an incumbent's switch before those calls reach the competing LEC's switch. The incumbent is not involved in the routing of their calls. Under these circumstances, the incumbent cannot detect, let alone screen out, individual calls that involve backhaul on an entrance facility.

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33. *See* California Public Utilities Commission Br. at 6-7; *see also Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071-72 (7th Cir. 2008) ("The state commission tells us that ILECs can detect and block any attempted use of an entrance facility for backhauling. (Every carrier, ILEC or CLEC, must be able to determine the traffic's destination in order to route it accurately.)"); *Pacific Bell Tel. Co. v. Cal. Pub. Utils. Comm'n*, 621 F.3d 836, 842 n.8 (9th Cir. 2010) ("Incumbent LECs are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call."), *petition for cert. pending*, No. 10-838 (filed Dec. 23, 2010).

Equally unsatisfactory is the government's attempt to blunt the regulatory arbitrage that would inevitably result if the petitioners were to prevail by seeking to limit this case to "existing" entrance facilities.[34] As Michigan Bell correctly notes, neither the underlying state commission order at issue nor the petitioners ever acknowledge, let alone embrace, this limitation.[35] Indeed, the government's distinction between existing and new entrance facilities is not endorsed by the California Public Utilities Commission – a state commission that has required incumbents to provide entrance facilities at TELRIC rates under section 251(c)(2) in a decision affirmed by the Ninth Circuit.[36] According to the California Commission, that requirement applies to "existing or new" entrance facilities.[37]

Furthermore, the government's reasoning is nonsensical. On the one hand, the government insists that incumbents should be required to provide *existing* entrance facilities at TELRIC rates because doing so is allegedly consistent with FCC and court decisions interpreting section 251(c)(2) to require incumbents under certain circumstances to "construct[] new facilities where none already exist."[38] On the other hand, the government argues that incumbents are not required to construct *new* entrance facilities where none exist because the FCC has yet to "rule" whether section 251(c)(2) imposes such

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34. United States Br. at 25 n.7.

35. Michigan Bell Br. at 51.

36. *See Pacific Bell*, 621 F.3d 836.

37. California Public Utilities Commission Br. at 22.

38. United States Br. at 23.

an obligation.[39] This reasoning also overlooks that the "existing" entrance facilities at issue have been provided by the incumbent at TELRIC rates only because they were constructed at a time when the FCC's rules required that entrance facilities be "unbundled" under section 251(c)(3) – rules subsequently adjudged to be unlawful. Thus, under the government's reasoning, competing LECs would continue to enjoy the benefit of TELRIC rates for existing entrance facilities constructed by the incumbent under an unlawful regulatory regime, while competing LECs would not be entitled to TELRIC rates for new entrance facilities requested under the current regulatory regime.

B. Backhaul does not just involve the routing of traffic from one competing LEC customer to another.

The petitioners erroneously claim that backhaul only involves the routing of traffic from one competing LEC customer to another.[40] The United States Courts of Appeals for the Seventh and Ninth Circuit made a similar error.[41] The reasoning underlying this claim appears to

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39. *Id.*

40. *See, e.g.*, Michigan Public Service Commission Br. at 8-9, 21, 22, 24-25, 29, 35; Talk America Br. at 23, 26 (referring to backhaul as a CLEC "carry[ing] traffic to and from its end users"); *cf.* California Public Utilities Commission Br. at 5 (stating that backhaul involves the use of an entrance facility "to route traffic to and from a CLEC's end users located in the ILEC's service territory").

41. *Illinois Bell*, 526 F.3d at 1071 ("Using an entrance facility to move voice or data traffic among CLEC customers has come to be known as 'backhauling,' . . ."); *Pacific Bell*, 621 F.3d at 842 ("In the case of backhauling, the competitive LEC uses the entrance

be that competing LECs should be entitled to obtain entrance facilities at TELRIC rates when they are used for interconnection because multiple carriers (and their customers) benefit from the arrangement; by contrast, a competing LEC is not entitled to obtain entrance facilities at TELRIC prices when they are used for backhaul because it only benefits the competing LEC (and its customers).[42] This reasoning is misguided for two reasons.

First, as noted above, the same entrance facility (transport system) is used both to exchange traffic and for backhaul. Second, backhaul involves the connection of a competing LEC customer's loop to the competing LEC's switch from which the customer draws dial tone that is transported over an entrance facility; it has nothing to do with calls placed to or by the competing LEC's customer with a "backhauled" dial-tone line. A competing LEC's customer with a "backhauled" dial-tone line can use that line to make any kind of telephone call, including long

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facility to permit its own customers to reach one another over the incumbent LEC's network."); *see also Mich. Bell Tel. Co. v. Comm'cus Corp.*, 597 F.3d 370, 388 (6th Cir. 2010) (Sutton, J., dissenting) ("When used for backhauling, entrance facilities route traffic between two of the competitor's customers, likely because the competitor leases some elements of the incumbent's network, rather than between a customer of the competitor and a customer of the incumbent.").

42. *See, e.g., Pacific Bell*, 621 F.3d at 847 ("Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits—both the originator and the recipient of the call are competitive LEC customers."); Michigan Public Service Commission Br. at 27 (arguing that with backhauling "the network that the competitive carrier creates is really its own"); *id.* at 28-29.

distance, and to call any kind of customer, including: (i) customers served by the same competitor (who may or may not also have a "backhauled" dial-tone line); (ii) customers served by a different competitor; (iii) customers served by the incumbent; and (iv) customers served by wireless carriers. In each type of telephone call, the circuit that is "backhauled" is the loop connection from the competing LEC's customer to the competing LEC's switch that is transported over the entrance facility, regardless of the origin or destination of that call.

C. Entrance facilities are fundamentally different from other steps that incumbent LECs must take to facilitate interconnection.

The petitioners and some of their supporting *amici* argue that requiring incumbent LECs to provide entrance facilities at TELRIC rates under 47 U.S.C. § 251(c)(2) is consistent with the duties imposed upon incumbent LECs to facilitate interconnection.[43] This argument is flawed.

First, while an incumbent may be required to "modify" its facilities "to the extent necessary to accommodate interconnection," such modifications are dissimilar to requiring an incumbent to provide a competing LEC with entrance facilities.[44] A good example of the "modifications"

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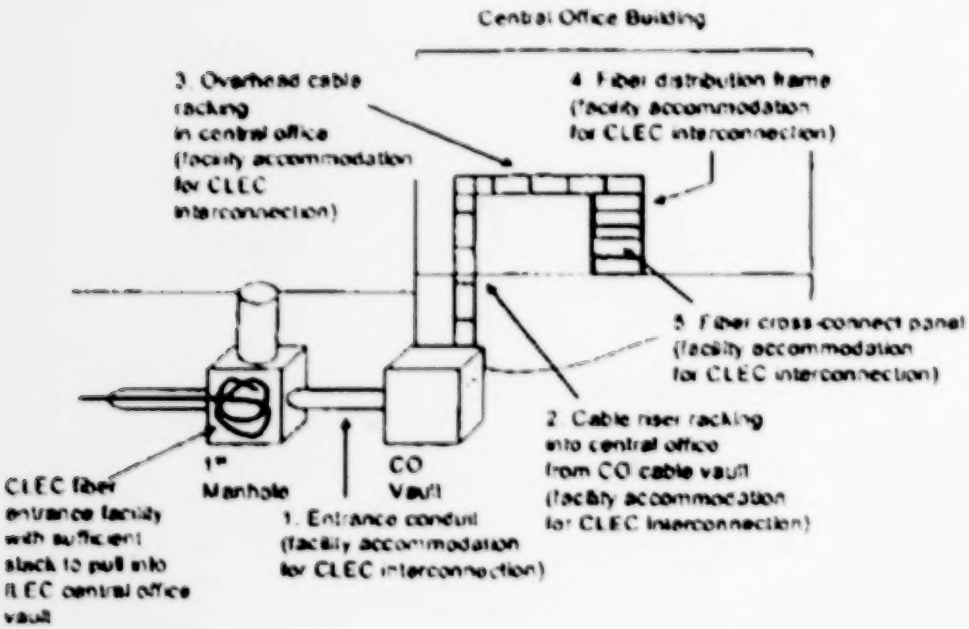
43. *See* Talk America Br. at 32-33; Michigan Public Service Commission Br. at 29-32; United States Br. at 24-25.

44. *Local Competition Order* at 15602-03, ¶ 198; *see also id.* at 15,605, ¶ 202 ("[T]he incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector."); *see* Michigan Public Service Commission Br. at 31 (arguing that "an obligation to modify facilities indicates a duty to build or change existing facilities").

an incumbent LEC may be required to make to its network involves the situation when a competing LEC self-provisions an entrance facility or obtains that facility from a third party. In such a situation, the competing LEC or third party will run the entrance facility fiber optic cable to a manhole near the incumbent's central office, and the incumbent in turn will perform certain activities in order to connect the entrance facility to its network. These activities are depicted in Figure 8.[45]

FIGURE 8:
ILEC Network Modifications to Accommodate Interconnection



45. Figure 8 is reproduced from a brief filed with the Ninth Circuit in *Pacific Bell*. *See* Brief of Appellant AT&T California at 35, *Pacific Bell Tel. Co. v. Cal. Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. June 27, 2008).

As reflected in Figure 8, to connect an entrance facility provided by a CLEC or a third party to the incumbent LEC's network, the incumbent will: (i) provide conduit in its cable vault through which to pull the competing LEC's fiber cable; (ii) furnish riser cables and overhead racking to extend the competing LEC's fiber cable into the incumbent's central office; (iii) terminate the competing LEC's fiber cable to a fiber distribution frame; and (iv) cross-connect the competing LEC's fiber cable with the incumbent's network.

All of the activities described above occur in the incumbent LEC's central office, and they largely utilize existing equipment and facilities in the incumbent LEC's network for which the competitor pays TELRIC rates. None of these activities are remotely comparable to the work required to provide a competing LEC with an entrance facility – namely, designing, engineering, constructing, and activating a new Fiber Optic Transport System. Indeed, the work necessary to deploy an entrance facility involves precisely the type of activities that the FCC has held an incumbent is not required to perform in connection with its unbundling obligations under Section 251(c)(3).[46]

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46. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,374, 17,381, ¶¶ 636, 648 (2003) (determining that "no incumbent LEC is obligated to build out facilities at TELRIC pricing" or to "trench or place new cables for a requesting carrier"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (upholding determination that modification requirement does not include "construction of new wires").

Second, that the FCC requires an incumbent to establish meet point interconnection cannot reasonably be construed to require an incumbent to deploy entrance facilities at TELRIC rates.[47] In a meet point interconnection arrangement, "each party pays its portion of the costs to build out the facilities to the meet point."[48] Because a competing LEC must bear its own costs of construction of a meet point arrangement and because its ability to select the meet point location is constrained,[49] the competing LEC has little economic incentive to select a meet point that is located a considerable distance from its switch.[50]

However, these economic incentives would be seriously skewed if a competing LEC could obtain entrance facilities at TELRIC rates. For example, in Figure 5, the competing LEC switch located in Smyrna, Georgia is 8.3 miles from AT&T's Courtland Street central office. If the competing LEC operating that switch could pay TELRIC rates for

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47. *See* Michigan Public Service Commission Br. at 30-31; United States Br. At 24.

48. *Local Competition Order* at 15,780-81, ¶ 553.

49. *Id.* (noting that meet point interconnection requires only "some" "limited build-out of facilities" as an "accommodation of interconnection" and that "the appropriate distance that would constitute the required reasonable accommodation of interconnection" should be left to the parties and state commissions).

50. *Cf. Triennial Review Remand Order* at 2611, ¶ 138 (noting that competing LECs "have a unique degree of control over the cost of entrance facilities" because "they often locate their switches close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities").

AT&T to deploy and operate a fiber optic transport system that would cover the entire distance from Smyrna, Georgia to the Courtland Street, there would be little reason for the competing LEC to incur the actual cost of building out to a meet point and jointly operating a meet point arrangement.

Finally, in support of their claim that incumbents are required to provide entrance facilities in order to facilitate interconnection, the petitioners point to the incumbents' duty to provide "two-way trunking," which an incumbent must do upon request if technically feasible.[51] Trunks can be either one-way or two-way. On a one-way trunk, traffic is originated from only one side of the trunk, while traffic is originated from either side on a two-way trunk. However, like other circuits, a trunk rides on a transport facility, and the work required to provide two-way as opposed to one-way trunks on a particular transport facility is unrelated to and independent of the work required to design, engineer, and construct that transport facility. Provisioning one-way or two-way trunking is merely a matter of programming the two switches on either side of the trunk. Therefore, the activity involved in provisioning two-way trunks riding an entrance facility is grossly dissimilar as well as irrelevant to those required to deploy that transport facility, and the obligation to do the former cannot reasonably be used to justify the latter.

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51. 47 C.F.R. § 51.305(f); *see* Talk America Br. at 33-34 (citing 47 C.F.R. § 51.305(f) in support of the argument that "the FCC has ruled that the right to interconnection includes a competitor's right to obtain a physical facility from the ILEC for use in transmitting, i.e., exchanging, traffic between the two networks"); Michigan Public Service Commission Br. at 31.

CONCLUSION

This Court has before it an important case that can shape incentives in the deployment of the nation's communications infrastructure. Upon careful evaluation of the regulatory interpretations put forth by the parties and *amici*, keeping in mind the technical realities faced by incumbent and competing carriers around the country, the Court should affirm the Sixth Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF NETWORK ENGINEERS

Donald E. Albert
Mr. Albert's telecommunications career spans more than 33 years. He has held positions with Verizon, Bell Atlantic, and the former C&P Telephone Companies. He has had a variety of assignments in engineering, operations, network planning, capital management, and sales. As Engineering Director of competitive LEC Implementation at Verizon, he was responsible for engineering issues associated with interconnection agreements between Verizon and competitive LECs, including the related modification and development of Verizon's engineering processes and procedures. He has testified as Verizon's engineering witness in approximately 100 proceedings before thirteen state regulatory authorities and the FCC involving Verizon's entry into the long distance market, Verizon and competitive LEC interconnection agreement arbitrations, and Verizon's TELRIC cost studies.

Mary T. Gray
Ms. Gray's telecommunications career spans more than 30 years. She had held positions with SBC and Southwestern Bell Telephone. As Director of Planning and Engineering at SBC, she coordinated federal and state regulatory filings involving networks, supported network projects with seven state public utility commissions, and formulated company policy and negotiated contracts with competing LECs.

Appendix

W. Keith Milner

Mr. Milner's telecommunications career spans more than 40 years. He has held positions with, among others, Bell Communications Research, AT&T, and BellSouth. He has extensive experience in all phases of telecommunications network planning, deployment, and operations in both the domestic and international arenas. As Assistant Vice President, he testified before nine state regulatory authorities and the FCC on such issues as the technical capabilities of network facilities, new service offerings, expanded calling areas, unbundling of network facilities, and network interconnection.

Barry Orrel

Mr. Orrel's telecommunications career spans more than 22 years. Retiring as an Executive Director at Qwest Communications, he performed a variety of roles, including: Interoffice Facilities Planning Engineer, Central Office Toll Equipment Engineer, Digital Subscriber Loop Design Engineer, T1 Installation Project Manager, Interconnection Agreements Negotiator, and CLEC Collocation Project Manager. Additionally, he has provided oral and written testimony in various administrative jurisdictions, addressing such topics as network interconnection terms and conditions, support of engineering inputs for UNE loop TELRIC modeling, UNE unbundling, and wholesale loop installation/maintenance performance metrics.

AMICUS CURIAE BRIEF

11 3-8-11

IN THE

Supreme Court of the United States

TALK AMERICA INC.
AND
ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND
GREG R. WHITE, COMMISSIONERS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN, ET AL.,
Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR VERIZON AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MICHIGAN BELL TELEPHONE COMPANY

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Vonage Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2010 Results* (Feb. 15, 2011), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=550145 10

INTEREST OF AMICUS CURIAE[1]

The Verizon telephone companies ("Verizon") filing this amicus curiae brief are incumbent local exchange carriers ("ILECs") in more than 20 states. Therefore, like Respondent Michigan Bell Telephone Company, d/b/a AT&T Michigan ("AT&T"), Verizon is subject to 47 U.S.C. § 251(c)(2). Verizon has opposed efforts by competitive local exchange carriers ("CLECs") to convince state regulators, such as the Michigan commission, that section 251(c)(2) requires ILECs to provide their competitors with entrance facilities at extremely low rates determined using a methodology designed by the Federal Communications Commission ("FCC") known by the acronym "TELRIC." Verizon has a significant interest in the proper interpretation of its obligations under 47 U.S.C. § 251(c)(2), and this decision will have a direct effect on Verizon's operations as an ILEC throughout the country.

SUMMARY OF ARGUMENT

Verizon agrees with AT&T that section 251(c)(2) does not require incumbents to provide competitors with entrance facilities at TELRIC rates and that the Sixth Circuit accordingly should be affirmed. Petitioners and their *amici* seek to portray the availability of entrance facilities at TELRIC rates as a crucial build-

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Verizon or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this amicus curiae brief have been filed with the Court.

ing block for local telephone competition. But that could not be further from the truth. In fact, competition for telecommunications services is flourishing today not because of entities that use incumbent-provided entrance facilities obtained at TELRIC rates, but because of intermodal, facilities-based competitors such as cable companies, wireless carriers, and Voice over Internet Protocol ("VoIP") providers. Carriers that rely on TELRIC-priced incumbent facilities are at best fringe competitors, and, even as to them, the FCC has previously found that they can economically self-provide entrance facilities or obtain them from third parties. Thus, the claim that competition and consumers will be harmed if entrance facilities are not made available at artificially low TELRIC prices is incorrect.

ARGUMENT

For the reasons set forth by AT&T, the Sixth Circuit correctly held that neither section 251(c)(2) nor any FCC order implementing that provision requires incumbent carriers to provide entrance facilities to competitors at TELRIC rates, and the arguments to the contrary by Petitioners and their *amici* are erroneous. As set forth below, that is confirmed by the fact that TELRIC-priced entrance facilities are not needed to fulfill the primary purpose of section 251—namely, to encourage local telephone competition.

I. Requiring Incumbent Carriers To Provide Entrance Facilities At TELRIC Rates Under Section 251(c)(2) Would Not Promote Competition

Petitioners and their *amici* assert that section 251(c)(2) should be interpreted to impose a duty on incumbents to provide entrance facilities at TELRIC rates because that would serve the Act's purpose of encouraging the development of competition. But mar-

ketplace evidence demonstrates that incumbent-provided entrance facilities are not needed to foster competition.

1. In seeking to show that the Sixth Circuit's decision would harm competition, Petitioners and their *amici* substantially overstate what is at issue in this case. The Michigan commission's suggestion that the Sixth Circuit's decision requires competitors to "recreate an entire network" (Michigan Br. 32) is wrong. This case involves only the transport facility that connects two networks, not any of the other facilities that comprise a network. Competitors that choose not to engage in facilities-based competition can still lease unbundled network elements from incumbents under section 251(c)(3), and they have the right to resell incumbents' retail telecommunications services under section 251(c)(4).

Likewise, Sprint's paean to the importance of interconnection for competing carriers (Sprint Br. 25-26) misses the point. The right to interconnect is not in dispute here. Wholly apart from any alleged obligation to provide entrance facilities at TELRIC rates, *all* carriers are obligated "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). And incumbents in particular must "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." *Id.* § 251(c)(2).

Petitioners and their *amici* nevertheless suggest that, absent a requirement for incumbents to provide entrance facilities at TELRIC rates under section

251(c)(2), competing carriers will be unable to interconnect with incumbent carriers because incumbents will be able to unilaterally raise entrance facility rates to supracompetitive levels. Sprint Br. 28; *id.* at 15 ("The court of appeals' approach would run counter to the objectives of the Telecommunications Act, because it would permit incumbents unilaterally to exact higher prices for facilities used for interconnection[.]"); CPUC Br. 15 (Sixth Circuit decision allows incumbents to "charge competition-dampening rates" (internal quotation marks omitted)).

But this is incorrect for at least two reasons. First, incumbents provide entrance facilities at tariffed rates, which are subject to regulatory oversight for compliance with the statutory "just and reasonable" standard at the federal level, 47 U.S.C. § 201(b), and with similar standards at the state level, *see, e.g.*, Mass. G.L. c. 159 § 14. As a result, incumbent carriers do not have unfettered discretion to raise rates for entrance facilities, and federal and state regulators retain the authority to address claims that incumbents are raising such rates to unreasonable levels.

Second, as the FCC already found when it eliminated incumbents' obligation to provide entrance facilities as unbundled network elements, competing carriers are *not* captive to incumbents for obtaining these facilities. Entrance facilities are nothing more than easily replicable high-capacity fiber optic cables that transport large amounts of traffic between two networks. They are "characterized by unique operational and economic characteristics" that "justify self-

deployment by a competitive LEC."[2] Moreover, competitors "increasingly rely[] on competitively provided entrance facilities," which "are widely available."[3] Indeed, at least 28 different competitors have deployed fiber in the top 50 metropolitan areas in the country, for a total of over one hundred thousand local route miles of fiber.[4] In fact, Petitioner Talk America's parent company, PAETEC, owns thousands of these fiber route miles,[5] and last month reported to investors its "robust fiber network expansion."[6] Not surprisingly in light of this wide availability of fiber, the FCC has pointed to evidence showing that competitors often migrate from incumbent entrance facilities to those provided by other parties.[7] Verizon's own recent experi-

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[2] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533, ¶¶ 138, 141 (2005) ("*UNE Remand Order*"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[3] *Id.* ¶¶ 139, 141.

[4] *See* Brogan & Leo, *High-Capacity Services: Abundant, Affordable, and Evolving* 24 (July 2009), *available at* http://www.ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf.

[5] PAETEC Press Release, *PAETEC Completes Acquisition of Cavalier Telephone* (Dec. 6, 2010), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Completes-Acquisition-of-Cavalier-Telephone.html.

[6] PAETEC Press Release, *PAETEC Holding Corp. Announces 2010 Full Year and Fourth Quarter Results* (Feb. 17, 2011), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Holding-Corp-Announces-2010-Full-Year-and-Fourth-Quarter-Results.html.

[7] *UNE Remand* Order ¶¶ 138-139, 141.

ence as both an incumbent and a competitive LEC confirms that competitors often self-provision entrance facilities or obtain them from third parties instead of leasing them from incumbents at tariffed rates.

Petitioners and their *amici* claim that the FCC's determination is irrelevant here because it was made in the context of evaluating the incumbent's duty to provide unbundled network elements under section 251(c)(3), not what they emphasize is the distinct interconnection duty under section 251(c)(2). *See* Gov't Br. 27-30; Comptel Br. 5-9, 13-14; Sprint Br. 16-17. But the FCC's conclusion that competitors are not impaired without access to entrance facilities as an unbundled network element rested on the *factual* finding that competitors can and do self-provide those facilities or obtain them from third parties. Because, as Comptel itself notes (at 13), the *same* physical entrance facility is implicated under both section 251(c)(2) and section 251(c)(3), the FCC's factual finding concerning the ready availability of entrance facilities remains true regardless of the purpose for which the competitor seeks to use those facilities.

In short, competing carriers have numerous options for obtaining the facilities they need to interconnect with incumbent networks apart from entrance facilities provided by incumbents. And rates for incumbent-provided entrance facilities are, in all events, subject to state and federal regulation to ensure they are provided on just and reasonable terms. Thus, the specter of unilateral entrance facility price increases by incumbents is no threat to competition at all.

2. Marketplace evidence confirms that entrance facilities at regulated TELRIC rates are not necessary for competition to thrive. In fact, competition is flour-

ishing today. Crucially, that competition is coming overwhelmingly from facilities-based providers that do not rely on entrance facilities provided by incumbents, including intermodal providers such as cable companies, wireless carriers, and VoIP providers that offer service over broadband connections. As a result of such intermodal competition, the number of incumbent traditional switched access lines declined by more than *10 percent* in the space of just *one year* from December 2008 to December 2009.[8]

Cable. Customers have been migrating rapidly from traditional wireline services offered by incumbent telephone companies to cable providers. As of September 2010, there were approximately 23.5 million cable voice subscribers, an increase of 18 percent over the 19.6 million subscribers at the end of 2008, and nearly four times the 5.9 million subscribers at the end of 2005.[9] Cable companies currently provide phone service to about one in every four wireline phone house-

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[8] FCC, *Local Telephone Competition: Status as of December 31, 2009*, at 6, fig. 4 (Jan. 2011) ("*2009 Competition Report*"), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0111/DOC-304054A1.pdf; FCC, *Local Telephone Competition: Status as of December 31, 2008*, at 5, fig. 3 (June 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299052A1.pdf (number of incumbent switched access lines went from 117,975,000 as of December 31, 2008, to 105,826,000 as of December 31, 2009).

[9] NCTA, *Industry Data: Operating Metrics* (as of September 2010), *available at* http://www.ncta.com/Statistics.aspx (citing SNL Kagan); NCTA, *Cable Phone Customers 1998-2009*, *available at* http://www.ncta.com/Stats/CablePhoneSubscribers.aspx (last visited Mar. 7, 2011).

holds in the U.S.[10] One study predicts that by 2015, cable companies will have captured more than 45 percent of revenues from consumers for wireline voice services.[11] Vigorous competition between cable companies and incumbent telephone companies has resulted in lower prices for consumers. Between the fourth quarter of 2004 and the second quarter of 2010, the average monthly price of unlimited local and long-distance voice service fell by 25 percent for telephone companies and 20 percent for cable operators.[12]

Wireless. As the FCC has repeatedly found, "increasing numbers of mass market customers are subscribing to mobile wireless services," and "growing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service in lieu of wireline local services."[13] As of June 2010, wire-

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[10] Rodriguez, *A Strong Showing in Phone Service Competition*, CableTechTalk Blog (Jan. 13, 2011), *available at* http://www.cabletechtalk.com/digital-phone/2011/01/13/a strong-showing-in-phone-service-competition/.

[11] *See* Atlantic-ACM, *Wireless Wins, Wireline Wanes: U.S. Telecom Wired and Wireless Sizing and Share 2010-2015*, at 20 (2010).

[12] *See* Barden et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable Keeps the Pressure on Telco* 14, tbl. 9 (July 20, 2010) (voice component of triple-play packages cost $40.19 per month for telephone companies and $35.33 for cable operators); Barden et al., Banc of America Securities, *Wireline Services Pricing Update* 8 (Oct. 8, 2004) (in 4Q 2004, voice component of triple-play packages cost $53.72 per month for telephone companies and $44.24 for cable operators).

[13] Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd. 18290, ¶¶ 89-90 (2005); Memorandum Opinion and Order, *Verizon Communications Inc. and*

less carriers had a total of 292.8 million subscribers nationwide, or 93 percent of the U.S. population.[14] Approximately 99.6 percent of the U.S. population is served by one or more mobile voice providers, with 98.6 percent served by at least two and 95.8 percent by at least three.[15]

Consumers have responded by increasingly substituting wireless voice service in place of wireline service.[16] As of June 2010, 42.5 percent of American households had either abandoned landline service altogether or still had that service but barely used it.[17] More than a quarter of American homes—26.6 percent—had completely "cut the cord" by June 2010, with another 15.9 percent using wireless phones for all, or

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MCI, Inc., 20 FCC Rcd. 18433, ¶¶ 90-91 (2005); *see also* Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd. 5662, ¶¶ 95-96 (2007).

[14] CTIA, *Wireless Quick Facts*, *available at* http://www.ctia.org/advocacy/research/index.cfm/aid/10323.

[15] Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd. 11407, 11414 (2010).

[16] Memorandum Opinion and Order, *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules*, 22 FCC Rcd. 5207, ¶ 38 (2007) ("[C]onsumers are increasingly finding that [wireless and wireline] services serve as substitutes.").

[17] Blumberg & Luke, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2010*, at 2, 4 (Dec. 21, 2010), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf.

almost all, of their calls.[18] Cord-cutting continued to grow in the second half of 2010, increasing to 29 percent of all households by the end of 2010, with analysts projecting that figure would rise to as much as 55 percent by 2015.[19] In sum, wireless substitution is increasing "at a remarkable rate," driven by more competitive pricing, better devices, macro pressures, and changes in consumer preference, particularly among younger users.[20]

VoIP. As the FCC has recognized, "over-the-top" VoIP services—which are offered for use over a consumer's broadband Internet connection—"are increasingly being used as a substitute for traditional telephone service," and such services "contribute to the marketplace discipline of voice telecommunications services."[21] Vonage, the largest over-the-top VoIP provider, has about 2.4 million subscribers, a more than 600-percent increase from December 2004.[22] Clearwire—a wireless broadband provider that also offers

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[18] *See id.* tbls. 1 & 5.

[19] *See* Flannery et al., Morgan Stanley, *Telecom Services: Wireless Substitution Reaches 26.6% in 1H10, Doubles Fixed-Line Only* 1 (Jan. 30, 2011).

[20] *Id.* at 3 (noting that about 51 percent of those 25-29 years old have cut the cord).

[21] Report and Order, *Preserving the Open Internet*, 25 FCC Rcd. 17905, ¶ 125 (2010).

[22] *See* Vonage Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2010 Results* (Feb. 15, 2011), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=550145; Vonage Press Release, *Vonage Crosses 400,000 Line Mark* (Jan. 5, 2005), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=194545.

VoIP service over its 4G WiMAX network—already has approximately 1.1 million retail subscribers, and its network reached 119 million people by the end of 2010.[23] Providers such as Skype and Google also have seen skyrocketing numbers of VoIP users.

The upshot is that most competition for voice services is coming from intermodal, facilities-based entities that do not rely on incumbent, TELRIC-priced entrance facilities. Thus, any implication that TELRIC-priced entrance facilities are needed for competition to develop is contrary to marketplace reality. Indeed, the FCC itself has recognized that providers that rely on incumbent facilities in the form of unbundled network elements are little more than "fringe" competitors.[24] Even if some of those providers have business plans that depend on access to TELRIC-priced entrance facilities, the role of regulation is not to provide special protections to a preferred class of "fringe" competitors. Instead, the goal of any such regulation should be "the protection of competition not competitors."[25] And the evidence demonstrates that the absence of TELRIC-priced entrance facilities does not harm *competition*.

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[23] *See* Clearwire Press Release, *Clearwire Reports Record Fourth Quarter and Full Year 2010 Growth* (Feb. 17, 2011), *available at* http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1530258&highlight=.

[24] Memorandum Opinion and Order, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona MSA*, 25 FCC Rcd. 8622, ¶ 80 (2010).

[25] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphases added; internal quotation marks omitted).

3. That conclusion is confirmed by the experience of states that have (rightly) concluded that section 251(c)(2) does not require incumbents to lease entrance facilities to competitors at TELRIC rates for purposes of interconnection. For example, in November 2005, the Ohio commission reached the same decision as the Sixth Circuit,[26] and competition in Ohio subsequently increased. The most recent data from the FCC show that the percentage of customer lines in Ohio served by a carrier other than the incumbent local exchange carrier (not including wireless carriers) almost doubled from 15 percent in December 2005 to 29 percent in December 2009.[27] Likewise, the July 2006 decision in Pennsylvania holding that entrance facilities should not be available at TELRIC prices[28] did not squelch competition: the percentage of non-ILEC lines stood at 20 percent as of June 2006 and then grew to 32 percent by

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[26] Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment*, No. 05-887-TP-UNC, 2005 WL 3018712, at 22-23 (Ohio PUC Nov. 9, 2005).

[27] *2009 Competition Report*, tbl. 8; FCC, *Local Telephone Competition: Status as of December 31, 2005*, tbl. 8 (July 2006) ("*2005 Competition Report*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266595A1.pdf.

[28] Opinion and Order, *Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, No. P-00042092, 2006 Pa. PUC LEXIS 58, at *16 (Penn. PUC July 21, 2006).

December 2009[29]—again, without even counting wireless. A similar pattern is evident in other states.[30]

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The evidence therefore demonstrates that local telephone competition is flourishing without the availability of entrance facilities at TELRIC rates under section 251(c)(2). Indeed, because competitors have readily available alternatives to incumbent entrance facilities, requiring incumbents to make such facilities available at TELRIC rates creates a "disincentive to competitive LECs' infrastructure investment," which "hinder[s] the development of genuine, facilities-based competition" that the 1996 Telecommunications Act sought to foster. *UNE Remand Order* ¶ 218; *see also Illinois Bell Tel. Co.* v. *Box*, 548 F.3d 607, 610 (7th Cir.

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[29] *2009 Competition Report*, tbl. 8; FCC, *Local Telephone Competition: Status as of June 30, 2006*, tbl. 8 (Jan. 2007) ("*June 2006 Competition Report*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270133A1.pdf.

[30] For example, in Nevada the percentage of non-incumbent lines (again, not including wireless) grew dramatically from 13 percent to 32 percent following the state commission's November 2005 decision not to price entrance facilities at TELRIC. Order, *Complaint, Nevada Bell Telephone Company, d/b/a/ SBC Nevada versus Various Competitive Providers of Telecommunications Services in Nevada to Resolve Dispute on Conforming Nevada Interconnection Agreements to Governing Law Under the Telecommunications Act of 1996*, No. 04-9019, 2005 WL 3610617, at *5 (Nev. PUC Nov. 16, 2005); *2009 Competition Report*, tbl. 8; *2005 Competition Report*, tbl. 8. Vermont saw a similar increase, from 12 to 27 percent. Opinion, *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, No. 6932, 2006 Vt. PUC LEXIS 27, at *506-507 (Vt. Pub. Serv. Bd. Feb. 27, 2006); *2009 Competition Report*, tbl. 8; *June 2006 Competition Report*, tbl. 8.

2008) ("as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered"); *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) (1996 Act was intended "to stimulate competition—preferably genuine, facilities-based competition"). Thus, far from promoting competition as regulatory proponents claim, incorrectly interpreting section 251(c)(2) as requiring the provision of entrance facilities at TELRIC rates would discourage competition and harm consumer welfare.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2011